(1) Supreme Court, U.S.
FILED

031548 FEB 27 2004

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2004

EDWARD G. NOVOTNY, in his individual capacity and as Trustee of MIDWEST LIMITED AND SUNRISE INVESTMENT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

and

THE STATE OF COLORADO, Department of Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Edward G. Novotny, Prose
13106 HWY 491 N.
Cortez, Colorado 81321
(970)565-8353

QUESTION PRESENTED

Whether the United States and the Colorado Department of Revenue in the public interest can, without standing, rely upon court of appeal affirmation of contradictory district court decisions: (1) which intentionally held Edward Novotny under orders to conditions of involuntary servitude, (2) which denied him but granted the prosecution discovery practice, (3) which compelled jurisdiction though formally challenged, (4) which subjected him to a series of other legal contradictions for prosecutorial advantage, and (5) which simultaneously also held Etta B. Novotny in a contradictory state to conditions of involuntary servitude for purpose of wresting control of any real property interest she might acquire during litigation.

Whether the governments of the United States and the State of Colorado can tax the same income without deference to the mutually exclusive domestic sovereign power distribution delineated in the Tenth Amendment.

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Petitioner,

v.

UNITED STATES OF AMERICA, and THE STATE OF COLORADO, Department of Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Edward G. Novotny petitions for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Tenth Circuit.

The Judgment and Order of the United States Court of Appeals for the Tenth Circuit affirmed the Final Judgment of the United States District Court for the District of Colorado and appears in the attached Appendix. (Appendix 1-a).

JURISDICTION

This Petition to the Supreme Court of the United States will be timely filed if filed by February 28, 2004 based upon an approved 60 day extension to and including February 28, 2004 authorized by the Clerk, Supreme Court Application Number 03A515 to a Tenth Circuit Judgment and Order filed July 31, 2003. The original jurisdiction of the Court is invoked under 28 U.S.C. 1251(b)(2) for the controversy between the United States and the State of Colorado disputing the legality of trust properties.

The appellate jurisdiction of the Court is invoked on all other inextricably related matters under 28 U.S.C. 1254 (1) and 1331.

Jurisdiction is proper for review by the Court of factual injuries received in district court, affirmed on appeal to the Tenth Circuit, and now continuing unabated; injuries traceable: to errant federal administrative and judicial processes, to contradictory judicial decisions, and to injuries for which a favorable writ decision will redress.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article IV, Section 2, Constitution of the United States provides in pertinent part:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people . . . to . . . petition the Government for a redress of grievances.

The Tenth Amendment to the United States Constitution provides three absolutely separate domestic sovereign powers, to wit:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"[N]or shall any State deprive any person of liberty or property without due process of law;"

This review may turn on Sections 3, 4, 11, 15, 24, 25, and 28, Article II, Bill of Rights, Constitution of the State of Colorado and sundry laws enacted thereby.

LIST OF ALL PARTIES TO THE PROCEEDING

Originally Edward G. Novotny was named a defendant in his individual capacity for an alleged income tax deficiency for Years 1989, 1990, and 1991 and as Trustee in named

common law Trusts created lawfully in Year 1979 under Colorado law for the limited purpose of avoiding probate costs and for family planning.

Originally Etta B. Novotny was named a defendant in her individual capacity and as Trustee in the common law Trusts assumably due to her interests in the Trusts' real property.

The Colorado Department of Revenue was named defendant originally by the United States as an involuntary disputant and assumably as a condition precedent only, however Colorado did not perfect any liens against Edward Novotny or the Trusts' real property until after they became a defendant in District Court and then only for undeserved benefit..

The subject Trusts are common law contract agreements entered into over 20 years prior to the litigation by the Novotnys for the limited purpose of eliminating probate cost and for family planning as authorized by Colorado law, and the Trusts were named defendants in the civil litigation presumably to convert the Trusts' real property interest for purposes of a monetary remedy under false pretenses using the alleged income tax deficiencies claimed, but unproved, as the driving force against Edward Novotny.

Plaintiff United States originally filed a complaint in Year 1999 without lawful standing against the Novotnys and Colorado Department of Revenue claiming the illegality, but not the unconstitutionality, of the two 1979 common law Colorado Trusts as justification for an unproved income tax deficiency against Edward Novotny.

There are no publicly held corporations owning more than 10 percent of corporate stock.

The Novotnys have filed a SEALED False Claims Act, (FCA), Complaint pursuant to 31 USC 3729 *et seq.* in a case entitled *United States ex rel Novotnys v. Persons Licensed to Practice Law et al.*, CIV 03- D-2257 (PAC), DColo; the action was based upon: (1) exclusionary and tying antitrust agreements between the public officers of the Supreme Court of Colorado and the American Bar Association which bears the responsibility for their not being practiced in state and federal law; (2) their not having the courtroom skill and cunning necessary to defend themselves; (3) their being held to conditions of involuntary servitude for the advantage of those licensed unlawfully to practice law and benefitting from the antitrust agreements; and (4) their finding that the public officers who were required to be licensed attorneys as a condition precedent to enter state and federal office used their positions to hold the Novotnys to that asymmetry. The Department of Justice was served with a copy of the Novotnys' FCA Complaint and Disclosure Statement, it was provided information that the FCA suit has become a multi-district litigation, and it has since been notified that several FCA causes have become a multi-circuit litigation involving the Tenth and Eleventh Circuits.

FACTS MATERIAL TO THE QUESTION PRESENTED

The Novotnys started a lawful salvage business in Year 1957 without the need for any state or federal licenses or

permits and with their own private funds; neither the Novotnys nor the Trusts entered into by them later were insolvent at any time relevant.

Edward Novotny retired due to poor health in Year 1989 disposing of 2600 junk vehicles as scrap metal he possessed to Copperstate Metals, Inc., if wanted, for a private cash transaction.

The Petitioners Edward G. and Etta B. Novotny entered into a private contract with the subject Trusts in Year 1979 to exchange their ownership rights and interests in real property to the Trusts for substance and 100 valueless certificates.

Regarding the property interest, neither the Novotnys, the United States, nor the State of Colorado are in the chain of title to Trust properties yet the Court of Appeals ignored that fact. See Paragraph 1, BACKGROUND, Appendix 1-a

The Trusts were virtually identical, except for names, *in haec verba* to the trusts litigated and found valid under state law by the highest courts of Colorado in *Par Husan Ventures, et al. V. Thurl, et al., Docket 97CA948 (Colo.App. 1999), cert denied, Docket No. 99 SC* 508 (Colo. 2000)(en banc)(unpublished)[1]; the United States accused the Novotnys of transferring their real property interests to the Trusts by setting aside the

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1. Unpublished opinions may cited if opinion has value on a material issue. *Stump v. Gates*, 986 F.2d 1429 (10th Cir. 1993) (unpublished).

constitutionality of Colorado Trust law without a specific district Court decision addressing the constitutionality of that issue; and the Tenth Circuit affirmed the contradictory process absent due process of law and the equal protection of the law provided Novotny by the Fourteenth Amendment. Appendix 1-a.

The Internal Revenue Service, "IRS", audited the subject Trusts and found they had no tax deficiency, and that no change was necessary for the tax period 1983 through 1988. See Application for Employee Identification Number, EIN, 84-6238965 and 84-6238966 signed unlawfully *for* and without permission *from* Edward Novotny by Timothy A. Stern, Revenue Agent, P.O. Box 2148, Grand Junction, Colorado 81502 as though the two Trusts and Edward Novotny were United States chattel property. See no tax liability and signatures on U.S. Government Form SS-4s (Rev.8-89) as Appendix 2-a to d., and Thirteenth Amendment.

IRS agent Timothy Stern acquired EIN numbers for both Trusts in Year 1991 and backdated both of them to Year 1983 validating them as lawful Trusts from Year 1983 to Year 1991 for tax purposes which is cited as one contradiction in the United States Complaint as to the Trusts. Id at Item 10 on SS-4 and See Paragraph 2. Subparagraphs (2), (3), and (5), BACKGROUND, Appendix 1-a.

IRS officials filled out other forms, audited those forms, and then determined Edward Novotny alone had a tax deficiency for Years 1989 to 1991 in an active civil conspiracy; the IRS then recorded a fictitious document deceptively with the Montezuma County, Colorado Clerk as a legal instrument to give effect to their civil conspiracy whose objective was to authenticate the claimed, but unprovable, income tax deficiencies; the IRS did the foregoing without a requested and

authorized Administrative Hearing, a defect formally challenged by Edward Novotny; all of which contradictory practices the Court of Appeals affirmed. See *United* States *v. Murphy*, 937 F.2d 1032 (6th Cir. 1991) defining a civil conspiracy, and Tenth Circuit affirmed the district court judgment. Id. Page 5, Appendix 1-a.

At no time relevant did Edward Novotny receive any formal "Notice of Demand" titled as such for payment of taxes alleged to be due, and at no time did he receive any "Certificates of Assessment" as required by 26 USC 6303, (Appendix 5-a and b); since, a demanded Administrative Hearing of the assessment practices needed to preserve his judicial remedies was requested but never acknowledged or granted by IRS as required by law. (See certified letter sent to IRS dated November 20, 1998 included as Appendix 3-a and b, 26 USC §§ 6155 and 6203 included in Appendix 4-a..)

The blanket Trusts' liens clouded the titles from Year 1993 to the present of the Trusts' real property and interests therein which were created under Colorado law; the notices of liens, if valid, held the Trusts involuntarily thereby without the means for either the Novotnys' or the Trusts' interests to acquire competent legal counsel for the defense of themselves or the Trusts, on appeal and the liens simultaneously had the effect of holding the Trusts' interests to conditions of involuntary servitude should the trustees perish sometime during the entire litigation process; the process used by the Novotnys' and Trusts' opponents efficaciously limited that defense to the Novotnys' private funds in a prose status for the advantages of their opponent and for their disadvantages; and the decisions of the both lower courts held the Novotnys and the Trusts prejudicially to that asymmetry. See Appendix 1-a and Thirteenth Amendment.

IRS filed bogus notices of federal income tax liens against Edward Novotny and the Trusts' real property interest as though Edward Novotny was the sole owner of the real property; the liens were filed with the Montezuma, Colorado County Clerk in Years 1989 to 1991; the liens were signed by a person deceptively using a pseudonym, and filed as legal instruments, (See Line 23 to 25, Page 83 and Lines 1 and 2, Page 84, Transcript excerpts, Trust Exhibit A-24, Appellants' (Novotnys') Opening Brief, Tenth Circuit, for information on the pseudonym included in the Brief on Pages 41 to 44), which deceptively authenticated the assessment practices on which the liens were based; the assessment practices were formally challenged by Edward Novotny without a response and ignored both before the litigation and during subsequent court deliberations; moreover, the challenge included an offer to pay the money sought if the United States could validate Edward Novotny's owing such money. See Appendix 3-a and b for the certified letter to IRS making the demand and offering to pay on proof of the alleged debt and 26 USC § 6303, Appendix 4-a for IRS's indifference to the law and its duties..

Edward Novotny requested but did not receive the authorized Administrative Hearing in Year 1998 when he attempted to settle the alleged tax deficiency by offering the IRS prior to the civil action in District Court to pay any amount of debt provable or evidenced as due and owing; he never received any response from the IRS to the offer to pay the alleged tax delinquency before the civil action of the United States was brought in the District Court; and four years of litigation could have been avoided if the Plaintiff United States had not been indifferent to and complied with its own statutes. Id.

Edward Novotny was sued on the presumed income tax liabilities in Colorado Federal District Court using as court

evidence certain documents deceptively signed using a pseudonym for the tax years 1989, 1990, and 1991 and those illegal instruments were later filed in Colorado and upon review supported by the Tenth Circuit on appeal. Supra. and See Appendix1-a, and Appendix 4-b for 26 USC § 6304 which prohibits deceptive collection practices.

The federal judges of both the District of Colorado and the Tenth Circuit spoke unlawfully for an agency of Colorado State Government which constitutionally denied the mutually exclusive domestic sovereign powers of the Tenth Amendment which prohibits the commingling of state and federal powers under the 'one hand' doctrine, and which harmed the Novotnys by discrediting the legality of the Trusts created and maintained by them lawfully under Colorado Trust Laws; and Tenth Circuit Court held the Novotnys to that unconstitutional process prejudicially by denying the power of three amendments to the United States Constitution. See Tenth, Thirteenth, and Fourteenth Amendments.

The federal judges of the Colorado District claimed court jurisdiction without properly responding to Edward Novotny's jurisdictional challenge thereto, and without citing applicable federal statute lawfully granting the jurisdiction claimed; they thereby shackled Novotny to that unlawful condition of servitude involuntarily and prejudicially; and the Tenth Circuit falsely held him to that asymmetry on appeal for the subsequent benefit of the Colorado Department of Revenue. See Page 5, second paragraph Appendix 1-a in that neither 26 U.S.C. § 7402 nor 28 U.S.C. § 1340 authorizes or supports illegal and deceptive acts of the IRS.

The federal judges of the District of Colorado denied Novotny discovery practice effectively blindfolding him in the process involuntarily while simultaneously granting discovery

practice to United States against him , District Court Docket Number 163-1; that conduct in District Court voided the need for a transcript of trial since the prejudicial decisions are contained on the District Court Docket Sheet, Number 187 dtd 9/17/01; the judges of the Tenth Circuit approved that unlawful, prejudicial, and contradictory process in their final judgment. Id. Appendix 1-a .

The federal judges of the District Court held the Novotnys to conditions of involuntary servitude unlawfully for the benefit of their opponents which in turn benefitted the Colorado Department of Revenue, a co-defendant, at the Novotnys' expense without deference to the power of the Tenth and Thirteenth Amendments, and the Tenth Circuit held them to that asymmetry. Id. Appendix 1-a .

Federal District Court fallaciously by litigation trickery transferred to the Novotnys a dispute which evolved between the United States and the State of Colorado Legislature as the real parties in interest over the integrity of the Colorado Trust laws without deference to decisions of the Supreme Court of Colorado in *Par Husan Ventures* as though the Colorado Trust law was defective. Without proof. See *Par Husan Ventures, et al. V. Thurl, et al., Docket 97CA948 (Colo.App. 1999), cert denied, Docket No. 99SC508* (Colo. 2000)(en banc)(unpublished) and the *U.S. v. Novotnys, et al., v. Colorado*, 99-RB-2196 (PAC), DColo.

Federal Magistrate Judge validated the relevant Novotny bookkeeping ledgers - except for minor details; denied Plaintiff United States' Motion for Summary because their accounting figures were in dispute; the District Judge approved that judgment but ignored the worth of that decision in the summary judgment, then the judge ruled first that Edward Novotny had a tax deficiency for Years 1989, 1990, and 1991

based upon disputed accounting figures, and second that Edward Novotny had no business income for Years 1990 and 1991, while ignoring normal business expenses for year 1989. The contradiction was upheld by the Court of Appeals prejudicially. Appendix 1-a and Appendix 4 - d for IRS's Burden of Proof on booking validation: 26 U.S.C. § 7491.

The federal judges of Colorado denied Etta B. Novotny and Edward Novotny the opportunity to transfer the real and personal property wealth of their union under private contract and laws provided to them by the State of Colorado for that express purpose to potential survivors of their immediate family - should the Trusts fail under Colorado Law - even though Etta Novotny was granted an unlawful one-half undivided real property interest that belong to the Trusts. Supra. and Paragraph 1, Page 3, Appendix 1-a.

REASONS FOR GRANTING THE WRIT

There has been no information provided by the Court of Appeals to the Novotnys for why they affirmed the District Court's contradictory decisions provided herein. Edward Novotny sought an *en banc* review of the Tenth Circuit's final judgment for that specific purpose, his request was met with silence, it was then and there denied without competent comment, and the denial was based solely upon the indifference of the panel and the other judges in active service. Why the Court of Appeals held the Novotnys involuntarily to their Final Judgment and to the contradictions of the District Court by total silence remains a $183,000 mystery.

The Tenth Amendment issue concerning both government entities exercising concurrent sovereign domestic

power to tax the same income under state and federal authority simultaneously is prohibited by the mutually exclusive provisions of the amendment; either one or the other possesses taxing authority, not both; the amendment was a condition precedent to ratification of the Constitution of the United States of America; and the issue has a national impact worthy of the Court's attention as a nationwide issue..

The general public can not be and is not being served based solely upon contradictions expressed in the litigation as it proceeded in two federal courts to date by a dedicated silence of judicial officers of the latter court unfaithfully performing their duties as required by 5 USC 3331.

Although Edward Novotny is the lone petitioner, the Novotnys have been and are being held against their free will for the advantage of their opponents deceptively and the Court of Appeals deliberately held them to those conditions of involuntary servitude by upholding District Court contradictory decision and without the *en banc* recourse, (Appendix 6-a) and the Thirteenth Amendment..

For these reasons, the favorable writ sought by Edward Novotny should be GRANTED without delay.

CONCLUSION

Edward Novotny is left with the feeling that two government entities have not dealt justly with him. The feeling is justified by a host of outright contradictory decisions which when revealed were met with silence by the Court of Appeals. His feelings are further justified by the indifference of the judges involved to prohibitions expressed in both constitutions,

specifically the Tenth, Thirteenth and Fourteenth Amendments . Even if his feelings are overemphasized, the Nation is imperiled by the process suffered by him and that alone ought be addressed by the Court.

Respectfully submitted,

May 10, 2004
DATE

Edward George Novotny

Edward George Novotny, Petitioner
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Cortez, Colorado 81321
(970)565-8353

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
JUL 31 2003

FOR THE TENTH CIRCUIT
PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 02-1417
D.C. No. 99-RB-2196 (PAC))
(D. Colo.)

EDWARD G. NOVOTNY, in his individual capacity as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS,
Defendant-Appellant,

STATE OF COLORADO; DEPARTMENT OF REVENUE,
Defendant-Appellee,
and

ETTA B. NOVOTNY,
Defendant.

ORDER AND JUDGEMENT*

Before **TACHA**, Chief Judge, **BRORBY**, Senior Circuit Judge, and **HARTZ**, Circuit Judge.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; neverthess, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant Edward G. Novotny, appearing prose, appeals the district court's adverse judgment in this civil tax matter. He asserts that the district court lacked jurisdiction to hear and determine the case against him. This court exercises its jurisdiction pursuant to 28 U.S.C. §§ 1291 and affirms.

BACKGROUND

The United States brought suit to reduce to judgment assessments against Mr. Novotny for income taxes, penalties, and interest from tax years 1989 through 1991 and to foreclose its liens upon seven parcels of real property nominally held by two trusts, Midwest Limited and Sunrise Investments. The United States named as defendants in the action all known parties having an interest in the parcels of property, including the trusts, Etta B. Novotny (the taxpayer's spouse), and the State of Colorado, Department of Revenue (which had filed its own tax liens against the properties). The trusts, Mrs. Novotny, and the State of Colorado filed various counterclaims and crossclaims.

After a series of orders and a bench trial, the district court concluded that:
(1) Mr. Novotny was liable to the United States for federal income taxes and statutory assessments in the amount sought by the United States, $I 71,932.76;
(2) the transfers of the seven parcels of property to the trusts were void as to the United States, in that the trusts were shams and also alter egos and nominees of Mr. Novotny;
(3) the transfers should be set aside and the federal tax liens foreclosed on the properties; (4) Mrs. Novotny was entitled to judgment quieting title to her undivided one-half interest in the properties; and (5) the State of Colorado's tax lien against the properties is valid, subordinate, and junior to that of the United States.

Accordingly, the court entered judgment and ordered the properties sold, with one half of the net sal proceeds to be applied first to Mr. Novotny's federal tax liability, and if this liability is satisfied and funds remain, then to Mr. Novotny's Colorado state tax liability. The other half of the net proceeds was to be paid to Mrs. Novotny. The court also entered a deficiency judgment against Mr. Novotny and in favor of the United States, if the proceeds of the sale did not satisfy the federal tax debt. Only Mr. Novotny has appealed.[1]

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[1] Although Mrs. Novotny has entered a pro se notice of appearance, she is not an appellant in this matter. Neither she nor her husband may represent the trusts. *See Knoefler v. United Bank*, 20 F.3d 347, 348 (8th Cir. 1994) (holding that a nonlawyer trustee may not represent a trust in federal court). Further, as an (continued...)

DISCUSSION

Mr. Novotny's appellate arguments are not entirely clear, but they appear to focus on the district court's jurisdiction. We review the question of the district court's jurisdiction de novo. *Kunkel v. Cont'l Cas. Co.*, 866 F.2d 1269, 1273 (10th Cir. 1989).

Although we liberally construe Mr. Novotny's prose appeallate brief, *see Ledbetter v. City of Topeka*, 318 F .3d 1183, 1187 (10th Cir. 2003), we will not assume the role of his advocate, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). As we decipher the argument section of Mr. Novotny's brief, he makes four jurisdictional challenges. First, he claims that the federal district court lacked jurisdiction to determine the legal status of the trusts for tax purposes, because the ruling "debauch[ed] unlawfuUy the trust laws enacted by the Colorado Legislature as purveyors of a sham," Appellant's Br. at 9. Second, he asserts that the United States did nto comply with his own novel interpretation of 26 V.S.C. §§ 7401., a provision which states that a tax civil action may not commenced unless the Secretary of Treasury or his delegate authorizes it and the Attorney General or his delegate directs that it be commenced. Third, he claims that, in ruling against him, judicial officials violated their oaths promising to

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[1] (continued...)
individual litigant, Mrs. Novotny prevailed in district court.

defend the United States Constitution and were therefore acting outside of their jurisdiction. And finally, he argues that the district court lost its jurisdiction when it applied the general rule that taxpayers bear the burden of establishing the error in the IRS's determination of the tax due, *United States v. Brown*, - F.3d - ' No. 01-4229, 2003 WL 21529086, *4 (10th Cir. July 8, 2003), a procedure that left him defenseless against an unconstitutional bill of pains and penalties.

In is plain that 26 U.S.C. § 7402 and 28 U.S.C. § 1340 explicitly vest federal district courts with jurisdiction over civil actions involving the enforcement of the internal revenue laws. Further, the government satisfactorily established the necessary jurisdictional elements in this case. We fine no merit in Mr. Novotny's jurisdictional challenges and conclude that they are patently incorrect.

To the extent that Mr. Novotny has attempted to make other arguments on appeal, and seeks a review of evidentiary rulings or the sufficiency of the evidence, those arguments are waived by his failure to provide us with a transcript of the trial. *See United States v. Vasquez*, 985 F.2d 491,495 (10th Cir. 1993) (stating that a failure to file a transcript precludes review of evidentiary rulings or claims concerning sufficiency of the evidence).

Mr. Novotny's motion to file a supplement reply brief is GRANTED. The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Deanell Reece Tacha Chief Judge

Appendix 2-a

Form **SS-4**
(Rev August 1989)
Department of the Treasury
Internal Revenue Service

Application for Employer Identification Number

(For use by employers and others. Please read the attached instructions before completing this form.) Please type or print clearly.

84-6238965 ✓

EIN ~~C-5[illegible]~~

OMB No. 1545-0003
Expires 7-31-91

1 Name of applicant (True legal name) (See instructions.)
Midwest Limited [redacted] Trust

2 Trade name of business, if different from name in line 1
Same as 1

3 Executor, trustee, "care of name"
Edward G. Novotny

4a Mailing address (street address) (room, apt., or suite no.)
13106 US Hwy 666

5a Address of business. (See instructions)

4b City, state, and ZIP code
Cortez, CO 81321

5b City, state, and ZIP code

6 County and state where principal business is located
Montezuma, CO

7 Name of principal officer, grantor, or general partner. (See instructions.) ►

8a Type of entity (Check only one box.) (See instructions.)

- ☐ Individual SSN _____
- ☐ REMIC
- ☐ State/local government
- ☐ Other nonprofit organization (specify) _____
- ☐ Other (specify) ►
- ☐ Personal service corp.
- ☐ National guard
- ☐ Estate
- ☐ Plan administrator SSN _____
- ☐ Other corporation (specify) _____
- ☐ Federal government/military
- ☐ ~~Trust~~
- ☐ Partnership
- ☐ Farmers' cooperative
- ☐ Church or church controlled organization

If nonprofit organization enter GEN (if applicable) _____

8b If a corporation, give name of foreign country (if | Foreign country | State

BEST AVAILABLE COPY

Appendix 2-a (...continued)

applicable) or state in the U.S. where incorporated ▶

9 Reason for applying (Check only one box)

- ☐ Started new business
- ☐ Hired employees
- ☐ Created a pension plan (specify type) ▶
- ☐ Banking purpose (specify) ▶
- ☐ Changed type of organization (specify) ▶
- ☐ Purchased going business
- ☐ Created a trust (specify) ▶
- ☒ Other (specify) ▶ IRS Audit

10 Date business started or acquired (Mo., day, year) (See instructions.) 1-1-83

11 Enter closing month of accounting year. (See instructions.) 12-31

12 First date wages or annuities were paid or will be paid (Mo., day, year). **Note:** *If applicant is a withholding agent, enter date income will first be paid to nonresident alien. (Mo., day, year).* ▶

13 Enter highest number of employees expected in the next 12 months. **Note:** *If the applicant does not expect to have any employees during the period, enter "0."* ▶

Nonagricultural	Agricultural	Household
unknown		

14 Does the applicant operate more than one place of business? ☐ Yes ☒ No
If "Yes," enter name of business. ▶

15 Principal activity or service (See instructions.) ▶

16 Is the principal business activity manufacturing? ☐ Yes ☒ No
If "Yes," principal product and raw material used ▶

17 To whom are most of the products or services sold? Please check the appropriate box.
☐ Public (retail) ☐ Other (specify) ▶ ☐ Business (wholesale) ☐ N/A

18a Has the applicant ever applied for an identification number for this or any other business? ☐ Yes ☐ No
Note: *If "Yes," please complete lines 18b and 18c.*

18b If you checked the "Yes" box in line 18a, give applicant's true name and trade name, if different than name shown on prior application.

True name ▶ Trade name ▶

18c Enter approximate date, city, and state where the application was filed and the previous employer identification number if known.

Approximate date when filed (Mo., day, year)	City and state where filed	Previous EIN

Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete.

Name and title (Please type or print clearly) ▶ Timothy A Stern, Revenue Agent

Telephone number (include area code) (303) 243-9811

Signature ▶ Timothy A. Stern For Edward G Novotny Date ▶ 3-12-91

Note: *Do not write below this line. For official use only.*

Please leave blank ▶	Geo	Ind.	Class	[redacted] applying

For Paperwork Reduction Act Notice, see attached instructions. U.S. Governm... Form SS-4 (Rev. 8-89)

Appendix 2-a (...continued)

Appendix 2-b

Form **SS-4**
(Rev. August 1989)
Department of the Treasury
Internal Revenue Service

Application for Employer Identification Number

(For use by employers and others. Please read the attached instructions before completing this form.) Please type or print clearly.

84-6238966
EIN ~~0312-SP~~

OMB No. 1545-0003
Expires 7-31-91

1 Name of applicant (True legal name) (See instructions.)
Sunrise Investments Trust

2 Trade name of business, if different from name in line 1
Same as 1

3 Executor, trustee, "care of name"
Edward G Newtney

4a Mailing address (street address) (room, apt., or suite no.)
13166 US Hwy 666

5a Address of business. (See instructions.)

4b City, state, and ZIP code
Cortez, CO 81321

5b City, state, and ZIP code

6 County and state where principal business is located
Montezuma CO

7 Name of principal officer, grantor, or general partner. (See instructions.) ▶

8a Type of entity (Check only one box.) (See instructions.)

- ☐ Individual SSN _____
- ☐ REMIC
- ☐ State/local government
- ☐ Other nonprofit organization (specify) _____
- ☐ Other (specify) ▶
- ☐ Personal service corp.
- ☐ National guard
- ☐ Estate
- ☐ Plan administrator SSN _____
- ☐ Other corporation (specify) _____
- ☐ Federal government/military
- ☒ Trust
- ☐ Partnership
- ☐ Farmers' cooperative
- ☐ Church or church controlled organization

If nonprofit organization enter GEN (if applicable) _____

8b If a corporation, give name of foreign country (if applicable) or state in the U.S. where incorporated ▶	Foreign country	State

9 Reason for applying (Check only one box)

- ☐ Started new business
- ☐ Hired employees
- ☐ Created a pension plan (specify type) ▶ _____
- ☐ Banking purpose (specify) ▶ _____
- ☐ Changed type of organization (specify) ▶ _____
- ☐ Purchased going business
- ☐ Created a trust (specify) ▶ _____
- ☒ Other (specify) ▶ TRC, Audit

10 Date business started or acquired (Mo., day, year) (See instructions.)	11 Enter closing month of accounting year. (See instructions.)
1-1-85	12-31

12 First date wages or annuities were paid or will be paid (Mo., day, year). **Note:** *If applicant is a withholding agent, enter date income will first be paid to nonresident alien. (Mo., day, year).* ▶

13 Enter highest number of employees expected in the next 12 months. **Note:** *If the applicant does not expect to have any employees during the period, enter "0."* ▶	Nonagricultural	Agricultural	Household
	unknown		

14 Does the applicant operate more than one place of business? ☐ Yes ☐ No
If "Yes," enter name of business. ▶

15 Principal activity or service (See instructions.) ▶ Auto Salvage

16 Is the principal business activity manufacturing? ☐ Yes ☐ No
If "Yes," principal product and raw material used ▶

17 To whom are most of the products or services sold? Please check the appropriate box.
☐ Public (retail) ☐ Other (specify) ▶ ☐ Business (wholesale) ☐ N/A

18a Has the applicant ever applied for an identification number for this or any other business? ☐ Yes ☐ No
Note: *If "Yes," please complete lines 18b and 18c.*

18b If you checked the "Yes" box in line 18a, give applicant's true name and trade name, if different than name shown on prior application.

True name ▶ Trade name ▶

18c Enter approximate date, city, and state where the application was filed and the previous employer identification number if known.

Approximate date when filed (Mo., day, year)	City and state where filed	Previous EIN

Appendix 2-b (...continued)

Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete

Name and title (Please type or print clearly) ▶ Timothy A. Stern, Revenue Agent

Telephone number (include area code) (313) 243-4811

Signature ▶ Timothy A Stern for Edward E. Mowbray

Date ▶ 3-12-91

Note: *Do not write below this line. For official use only.*

Please leave blank ▶	Geo	Ind	Class	applying

For Paperwork Reduction Act Notice, see attached instructions.



Form SS-4 (Rev. 8-89)

COPY

Appendix 2-b (...continued)

Internal Revenue Service
District Director

Department of the Treasury

Date: JUN 18 1992

Form:
1041
Tax Period(s) Ended:
December 31, 1983 thru
December 31, 198
Person to Contact:
T. Stern E: 3:03 cls
Contact Telephone Number
243-9811

Midwest Limited Trust
13106 US Hwy 666
Cortez, CO 81321

Gentlemen:

We are pleased to tell you that our examination of your tax returns for the above period(s) shows no change is necessary in your reported tax. However, our examination may not reflect the results of examinations of flow-through entitles (Forms 1065-Partnership, 1120-S Corporation, 1041-Fiduciary Return) in which you may have an interest.

If you have any questions, please write to the person whose name is shown at the top of this letter or call that person at the telephone number shown. If the number is outside your local calling area, there will be a long-distance charge to you. If you prefer, you may call the IRS telephone number listed in your local directory. Am employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

If you write to us, please provide your telephone number and the most convenient time for us to call in case we need more information. Please attach this letter to any correspondence to help us identify your case. Keep the copy for your records.

Thank you for your cooperation.

Sincerely Yours,

G. F. Swanson

Gerald F. Swanson
District Director

Enclosure:
Copy of this Letter



600 • 17th St., Denver, CO 80202-2490
Letter 590(DO)(Rev. 10-88)

Internal Revenue Service
District Director

Department of the Treasury

Date: JUN 18 1992

Form:
1041
Tax Period(s) Ended:
December 31, 1983 thru
December 31, 198
Person to Contact:
T. Stern E: 3:03 cls
Contact Telephone Number
243-9811

Sunrise Investments Trust
13106 US Hwy 666
Cortez, CO 81321

Gentlemen:

We are pleased to tell you that our examination of your tax returns for the above period(s) shows no change is necessary in your reported tax. However, our examination may not reflect the results of examinations of flow-through entitles (Forms 1065-Partnership, 1120-S Corporation, 1041-Fiduciary Return) in which you may have an interest.

If you have any questions, please write to the person whose name is shown at the top of this letter or call that person at the telephone number shown. If the number is outside your local calling area, there will be a long-distance charge to you. If you prefer, you may call the IRS telephone number listed in your local directory. Am employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

If you write to us, please provide your telephone number and the most convenient time for us to call in case we need more information. Please attach this letter to any correspondence to help us identify your case. Keep the copy for your records.

Thank you for your cooperation.

Sincerely Yours,

G. F. Swanson

Gerald F. Swanson
District Director

Enclosure:
Copy of this Letter



600 • 17th St., Denver, CO 80202-2490
Letter 590(DO)(Rev. 10-88)

Edward George, Novotny SS 523-38-2839
c/o 13106 HWY 666 N.
Cortez, Colorado, U.S.A. (81321)

Date November 20, 1998
Certified Mail P 161 958 179

TO:
Department of the Treasury
Internal Revenue Service
Odgen, Utah, 84201

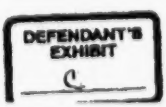
Dear I.R.S.

40. This American Citizen is returning attached presentment dated 11-2-98, numbered 002322-198912, **"without dishonor"** alleging that the presentment is unconscionable; inducement by unconscionable conduct; unconscionable debt collection, by Certified Mail, and for reasons states as follows.

41. The drafter of the instrument received notice of this Citizens defenses and conditions prior to the time that the instrument was assigned, and one defense, but not limited to, was that there had not been any consideration received by this Citizen from the presentment. (See 3-408 UCC)

Therefore this presentment is being returned without dishonor (UCC 3-505(1)(1989 supp)) as this Citizen has not received any reasonable identification of the person making presentment and evidence of his authority to make it if made for another, (UCC 3-505(1)(b)(1989 supp)) and failure to comply with such requirement invalidates the presentment (UCC 3-505(2)(1989 supp))

42. This Citizen is not a "corporate", "federal" or "privileged" "person", but a private Citizen acting in a "private" and "domestic" capacity pursuant to the Rights, Liberties, Immunities and Privileges secured by the Constitution for the



united States of America, and law of the land, which includes the God given Right and Liberty of making a living for himself and family, Therefore without further knowledge, this Citizen denies each and every allegation on your instrument, until the instrument is supported by law or contract. I have not received any known taxable income, and if I have received any taxable income, I must ask, **why the alleged tax was not collected at the sources as required by your own code.**

43. Your computer or agent/holder of the instrument sent me presentments or billings from Denver Colo. on March 10, 1998 alleging that I owed a total of approximately $299,993.62 for the last six (6) years of alleged federal income taxes. These instruments were all drafted by the I.R.S. computer or other agents, and had been each timely objected to, disputed and conditioned, from their first presentment.

44. Pursuant to the F.O.I.A. that the I.R.S. presented to me, I have the right to **request and receive evidence of the "law"** that requires this Citizen to be obligated to the "federal" income tax, which I have done. I am still being billed, but no agent from the I.R.S. has responded to my request for information or the law, indicating "fraud" on the part of each involved agent/ holder.

45. On Aug. 2, 1998, I sent the I.R.S a letter in Denver Colorado offering to tender payment to settle these accounts, and requested answers to just two questions. Since I.R.S. agents drafted the instruments and demanded the tax claimed due and owing, I simply wanted to know their definition of "income" or "taxable income" and where it can be found, and to know if "promissory notes" were taxable? Now the I.R.S. or it's agents still bill me, but have refused to respond to my F.O.I.A. request for information which to me indicates "fraud" on the part of the holder/agent(s).

59. If you claim that I am in error and if you are not acting in fraud or deceit, you must have the documents to support your claim of federal tax debt owed by this above named Citizen,

otherwise your presentments are "unconscionable contracts" / "unconscionable debt collection", based upon a manufactured alleged debt based upon third party unsupported hearsay information.

60. Therefore I am requesting factual material evidence of your claims such as: a) copies or evidence of any W2's that you rely on; b) copies of any 1040's or 1099's relied on, and if any 1099's are presented, a statement as to why the tax claimed due and owing was not collected at the "source"; c) copies of any financial statements relied on; d) evidence of any bank accounts, drafts or checks relied on, or e) copies of any other documents or instruments whether or not they contain secrete code numbers or identification or markings, that you rely on for your authority to tax, to support or establish your claims of a federal tax due and owing by me, unless f) the billing is a note assigned to some other holder for collection, I want the name of the person(s) who drafted and assigned the not to the new assignee or holder.

61. This Citizen has **offered to make full payment of any amount that I owe,** and still does, as I have no intention of breaking any law, rule, regulation or code, but I do deny and protest any illegal presentment of a bill for an alleged tax, that I do not receive any consideration or compensation from.

62. I have now been harassed by the I.R.S. and agents for over ten (10) years, and they have already filed liens against me for these alleged debts of over one Million dollars, and even against property that I do not own nor have ever had any legal interest in.

63. Unless the I.R.S. / or it's agents / holders of the instruments are attempting to deny me a remedy, I am now demanding to be informed of the people to contact in order to obtain an **Administrative agency hearing** in an attempt to put forth my issues and to preserve any judicial remedies that this Citizen may have.

64. If the presentments listed above are not discharged as well as the liens or if I do not hear back from some agent in person,

and not from a computer printout within thirty (30) days informing me of the law, the instruments, the privilege, the obligation, the compensation or consideration, or be informed of where I can obtain an Administrative agency hearing to preserve my remedies, then I will in desperation attempt to contact other Government agencies, or Congressmen in hopes of remedying these billings.

65. The I.R.S. and it's agents have placed this American Citizen is a state of bankruptcy, with limited resources left to tendering payment with, but if necessary I will offer you all that I own in hopes that it will be enough.

Sincerely: Edward George Novotny date: November 20, 1998.

Edward George, Novotny

cc: By Certificate of mailing.
Internal Revenue Service
Automated Collection Branch
600 17th Street, LB64
Denver Colo. 80202-2490

26 USC § 6155 Payment on notice and dem stated in such notice the amount of any tax (including any interest, additional amounts, additions to tax, and assessable penalties) stated in such notice and demand.
(b) Cross references.
(1) For restrictions on assessment and collection of deficiency assessments of taxes subject to the jurisdiction of the Tax Court, see sections 6212 and 6213.
(2) For provisions relating to assessment of claims allowed in receivership proceeding, see section 6873.
(3) For provisions relating to jeopardy assessments, see subchapter A of chapter 70.

26 USC § 6203 Method of assessment.
The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

26 USC § 6303 Notice and demand for tax.
(a) General rule. Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.
(b) Assessment prior to last date for payment. Except where the Secretary believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date

26 USC § 6304 Fair tax collection practices.

(a) Communication with the taxpayer. Without the prior consent of the taxpayer given directly to the Secretary or the express permission of a court of competent jurisdiction, the Secretary may not communicate with a taxpayer in connection with the collection of any unpaid tax--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the taxpayer;

(2) if the Secretary knows the taxpayer is represented by any person authorized to practice before the Internal Revenue Service with respect to such unpaid tax and has knowledge of, or can readily ascertain, such person's name and address, unless such person fails to respond within a reasonable period of time to a communication from the Secretary or unless such person consents to direct communication with the taxpayer; or

(3) at the taxpayer's place of employment if the Secretary knows or has reason to know that the taxpayer's employer prohibits the taxpayer from receiving such communication. In the absence of knowledge of circumstances to the contrary, the Secretary shall assume that the convenient time for communicating with a taxpayer is after 8 a.m. and before 9 a.m., local time at the taxpayer's location.

(b) Prohibition of harassment and abuse. The Secretary may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax. Without limiting the general application of the foregoing, the following conduct is a violation of this subsection:

(1) The use or threat of use of violation or other criminal means to harm the physical person, reputation, or property of nay person. (2) The use of obscene or profane language or language the national consequence of which is to abuse the hearer or reader. (3) Causing a telephone to ring or engaging any person in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(4) Except as provided under rules similar to the rules in section 804 of the Fair Debt Collection Practices Act (15 U.S.C. 1692b), the placement of telephone calls without meaningful disclosure of the caller's identity

(c) Civil action for violations of section. For civil action for violations of this section, see section 7433.

26 USC § 6320. Notice and opportunity for hearing upon filing of notice of lien.

(a) Requirement of notice.

(1) In general. The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice. The notice required under paragraph (1) shall be --

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or (C) sent by certified or registered mail to such person's last known address, not more that 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice. The notice required under paragraph (1) shall include in simple and nontechnical terms--

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals; and (D) the provisions of this title and procedures relating to the release of liens on property.

(b) Right to fair hearing.

(1) In general. If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Service Office of Appeals.

(2) One hearing per period. A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.
(3) Impartial officer. The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.
(4) Coordination with section 6330. To the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330.
(c) Conduct of hearing; review; suspensions. For purposes of this section, subsections (c), (d) (other than paragraph (2) (B) thereof), and (e) of section 6330 shall apply.

26 USC § 7491. Burden of proof.
(a) Burden shifts where taxpayer produces credible evidence.
(1) General rule. If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.
(2) Limitations. Paragraph (1) shall apply with respect to an issue only if--
(A) the taxpayer has complied with the requirements under this title to substantiate any item;
(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430 (c)(4)(A)(ii).

Subparagraph

(C) shall not apply to any qualified revocable trust (as defined in section 645(b)(1) with respect to liability for tax for any taxable year ending after the date of the decedent's death and before the applicable date (as defined in section 645(b)(2)).

(3) Coordination. Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers. In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceedings with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c) Penalties. Not withstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

FREEDOM OF INFORMATION ACT REQUEST
REQUEST FOR NOTIFICATION AND ACCESS

Internal Revenue Service Center
Disclosure officer, I.R.S.
1160 w 1200 South Street
Ogden Utah 84201

RECEIVED IN DISCLOSURE JP0047:13 DEC 13 2000

Date: August 28, 2000

Edward G. Novotny, SSN:# 523-38-2839
c/o 13106 HWY 666 N,

Cert. Mail. 7000 0520 0019 1701 6298

Dear Disclosure Officer:

1. This is a request under the FREEDOM OF INFORMATION ACT, 5 U.S.C. 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below ultimately determined in accordance with 26 C.F.R 601.702 (f).

2. If some of this request is exempt from release, please furnish me with those portions reasonably segregable, I am waiving inspection of the requested records.

3. I am attesting under penalty of perjury that I am a category (E) requester.

4. This request pertains to the Years 1989, 1990 and 1991. PLEASE EXPEDITE THIS REQUEST.

5. Please send me a copy of the AMDISA File, which pertains to the requester.

I understand that penalties provided in 5 U.S.C 552a (I) (3) for requesting or obtaining access to records under false pretenses.

Edward G Novotny Date: Aug 28th 2000

Edward G. Novotny: Requester
970-565-8353

Montezuma county)
) SS:
state of Colorado)

On this 28th day of August, 2000 A.D., before me Vickie Lewis personally appeared Edward G. Novotny, Proved to me on the basis of evidence to be the one whose name is subscribed to this instrument.

Notary Vickie Lewis My commission expires: Jan 14 2003

VICKIE LEWIS NOTARY PUBLIC

Internal Revenue Service

Director
Ogden I.R.S. Center

Edward G. Novotny
13106 HWY 666 N
Cortez, CO 81321

Department of the Treasury

P.O. Box 9941, Ogden UT 84409

Phone Number:
801-620-7650 NOT TOLL FREE
Refer Reply To:
Case Control Number: JP004213
Person to Contact:
Mr. Page 2999000255
Date:
September 26, 2000

Dear Mr. Novotny:

This is in response to your Freedom of Information Act request dated August 28, 2000, and received in our office September 6, 2000.

Form 4340, Certificate of Assessments and Payments, is a manually prepared document most often used in judicial proceedings. There are no Forms 4340 that pertain to you, and the Freedom of Information Act does not require us to create documents not already in existence.

If you have any questions regarding this correspondence, please contact Mr. Page at 801-620-7650 between the hours of 7:00 a.m. and 3:00 p.m. Mountain Time.

Sincerely,

JaNean Ellis
Disclosure Officer

Attachment(s):
Notice 393



UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

No. 02.1417
(D.C. No. 99-RB-2196(PAC))

EDWARD G. NOVOTNY, in his individual capacity as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS;
Defendant - Appellant,

STATE OF COLORADO, DEPARTMENT OF REVENUE,
Defendant - Appellee,

and

ETTA B. NOVOTNY,
Defendant,

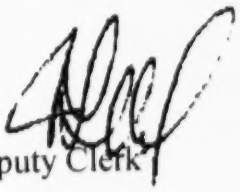
ORDER
Filed October 1, 2003

Before **TACHA**, Chief Judge, **BRORBY**, Senior Circuit Judge, and **HARTZ**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active servie. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: 
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 99-RB-2196 (PAC)

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JUL 03 2002

JAMES R. MANSPEAKER
CLERK

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD G. NOVOTNY, in his individual capacity and as Trustee of
MIDWEST LIMITED and SUNRISE INVESTMENT;
ETTA B. NOVOTNY, in her individual
capacity and as Trustee of MIDWEST
LIMITED and SUNRISE INVESTMENTS; and
THE STATE OF COLORADO, Department of Revenue,
Defendants.

MEMORANDUM OPINION AND ORDER

Blackburn, J.

INTRODUCTION

The United States of America ("Government") through its complaint and concomitant claims for relief seeks to reduce to judgment outstanding federal tax assessments against defendant Edward Novotny ("Novotny"). The assessments concern unpaid 1989, 1990, and 1991 federal income taxes, penalties, and interest. In addition, the Government seeks to foreclose the resultant federal tax liens under 26 USC §§ 7401 and 7403 on seven parcels of real property in Montezuma County, Colorado, titled in the names of defendants Midwest Limited ("Midwest") and Sunrise Investments ("Sunrise") (collectively re

ferred to as "Trusts"). The Trusts have filed a counterclaim against the Government and cross-claims against the other defendants to quiet title to these seven parcels of real property. Defendant Etta Novotny is the wife of Novotny and is named as a defendant because she may have an interest in the real property at issue. Etta Novotny has filed a counterclaim against the Government to quiet title, if any, in the subject properties. Defendant Colorado Department of Revenue ("Colorado") has filed cross-claims against the defendants seeking to foreclose its tax liens against the seven parcels of real property to satisfy a judgment entered in the Montezuma County District Court, case No. 99-CV-202, in favor of Colorado against Novotny for unpaid 1989 and 1990 Colorado income taxes, penalties, and interest.

The case was tried to the court June 3 through June 6, 2002. Philip E. Blondin and August Imholtz, III, appeared on behalf of the government. Robert Clark appeared on behalf of the state of Colorado. William Cohan appeared on behalf of the Trusts. Novotny and Etta Novotny appeared pro se.

The court having judicially noticed all relevant adjudicative facts in the file and record of this action; having considered the evidence educed at trial (including via deposition transcripts); and having considered the arguments advanced and authorities cited by the parties, enters the following findings of fact (based on preponderance of the evidence), conclusions of law, orders, judgements, and decrees.

FINDINGS OF FACT

A. Edward Novotny's Federal Income Tax Liability

1. Novotny stopped filing federal income tax returns starting with the 1979 tax year. See Exhibit 69.

2. Novotny maintains he is not required to pay federal income taxes.

Respondent has claimed that he is not a "person" required to file, and that he has no tax liability, as he is acting in a "private capacity," and not "corporate" nor "privileged", nor does

he receive any "consideration" from his actions.
Exhibit 38, Edward Novotny's Responses to United States Interrogatories at p. 5 ¶ 3; see also Exhibits 14, 47, and 49.

3. Novotny did not file federal income tax returns for the 1989, 1990, and 1991 tax years. After conducting audits for 1989, 1990, 1991, the Internal Revenue Service sent Notices of Deficiency for the 1989, 1990, and 1991 tax years to Novotny. See Exhibits 34 and 35; United States' Request for Admission Directed to Edward Novotny and Edward Novotny's Response to Request for Admission at para. 4-7; Exhibits 4 and 5, Notices of Deficiency sent to Edward G. Novotny; and Exhibit 49, letter to Douglas Kahl, Internal Revenue Service.

4. On the dates and in the amounts set forth below, a delegate of the Secretary of the Treasury of the United States made assessments against Novotny for unpaid federal income taxes and statutory additions to tax and gave notice and demand for payment thereof, for the following taxable periods;

TAX PERIOD ENDING	ASSESSMENT DATE	AMOUNT ASSESSED
12/31/1989	5/17/93	$85,700.00 (1)
	5/17/93	$ 5,796.00 (2)
	5/17/93	$ 35,615.20 (3)
	5/17/93	$ 21,425.00 (4)
	7/26/93	$ 10.00(5)
12/31/1990	5/17/93	$ 7,312.00 (1)
	5/17/93	$482.00 (2)
	5/17/93	$1,774.78 (3)
	5/17/93	$1,828.00 (4)
	7/26/93	$ 10.00 (5)
12/31/1991	11/14/94	$ 7,672.00 (1)
	11/14/94	$441.00 (2)
	11/14/94	$1,948.78 (3)

	11/14/94	$1,918.00 (4)
	Total:	$171,932.76

(1) = Assessment of tax.
(2) = Assessment of failure to pay estimated tax penalty.
(3) = Assessment of interest.
(4) = Assessment of late-filing penalty.
(5) = Assessment of fees and collection costs. See Exhibits 1, 2, and 3, Certificate of Assessments and Payments for Edward G. Novotny for 1989, 1990, and 1991 tax years respectively.

5. This court already has found that the Governments has established that Novotny received income in the amounts set forth in the Notices of Deficiency sent to him for the 1989, 1990, and 1991 tax years. See Memorandum Opinion and Order dated September 14, 2001, p. 20 (hereafter "Opinion"); [1] see also Exhibits 4 and 5. This court has held that the sole issue for trial with respect to Novotny's federal income tax liability is whether he is entitled to reduce his taxable income as determined by the Internal Revenue Service by deducting certain business expenses. Id.

6. Novotny has produced admissible evidence in an attempt to support his claim that he is entitled to reduce his taxable income for 1989 by expenses that were incurred in the operation of his business, Four Corners Auto Parts and Salvage. Novotny's business was operated on Parcel 3. The Novotny's personal residence also is located on Parcel 3.

7. The evidence in the record, which the testimony of Novotny and of Etta Novotny, does not provide a reasonable means to differentiate between personal expenses incurred by

[1] The parties consented to the exercise of jurisdiction by U.S. Magistrate Judge Coan with respect to the pending dispositive motions on June 11, 2001. See Notice of Availability of United States Magistrate Judge to Exercise Jurisdiction, dated June 11, 2001 [#172].

the Novotnys in 1989 and expenses incurred in operating the business during 1989. Most notable, Novotny claims that amounts paid for utilities such as water, electricity, propane gas, and telephone service, are business expenses. The evidence in the record demonstrates the cost of various utility services provided for the buildings on Parcel 3 during 1989. However, this evidence does not provide any basis to determine what portion of these expenses is related to the business expenses, the court cannot conclude that Novotny has established the amount of any reasonable business expenses he incurred in 1989.

8. Novotny claimed business expenses for 1990 and 1991. However, Novotny had no business income in 1990 or 1991. Thus, he is not entitled to reduce his taxable income by demonstrating that he incurred business expenses.

9. The court finds that the Assessment for tax years 1989 is correct, and that Novotny is not entitled to any reduction of his taxable income for that year based on his claimed business expenses. See Exhibit 1, Certificate of Assessments and Payments for Edward G. Novotny for 1989.

10. The court finds that the Assessment for tax years 1990 and 1991 are correct, and that Novotny is not entitled to any reduction of his taxable income for those years. See Exhibits 2, and 3, Certificate of Assessments and Payments for Edward G. Novotny for 1990, and 1991 tax yeas respectively.

11. The court finds that, as of June 3, 2002, Novotny owed the Government $383,446.33 (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) in unpaid taxes and statutory additions for the 1989, and 1990, and 1991 tax years.

B. The Seven Parcels of Property

12. Parcel 1 consists of two vacant lots on the corner of Empire and Broadway, Cortez, Colorado. These lots are sometimes referred to as 710 and 720 North Broadway. On or about February 3, 1977, a deed was recorded in the Clerk and

Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 1 (all references to the parcels are to the parcels set forth in the Government's Complaint. The parties have stipulated to the legal descriptions contained therein with the exception of the amount of acreage in Parcel 3 from Max Hamilton and Shyrel Noreen Hamilton to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $17,000.00 (seventeen thousand dollars). See Exhibit 51.

13. Parcel 2 consists of two commercial buildings located at 483 and 485 N. Broadway, cortez, Colorado. On November 18, 1977, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 2 from James R. Carpenter and Gail R. Carpenter to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $58,000.00 (fifty-eight thousand dollars). See Exhibit 53.

14. Parcel 3 consists of approximately 62 acres of land located at 13106 U.S. Highway No. 666, Cortez, Colorado. The Novotnys' primary personal residence is located at this parcel. On or about September 15, 1956, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 3 from Georgia Spickert a/k/a Mrs. Georgia Spickert to Edward G. Novotny and Etta B. Novotny, a joint tenants, for the stated consideration of $10.00 (ten dollars) See Exhibit 55.

15. Parcel 4 consists of 17 acres of land and is located at 23400 Road N., Cortez, Colorado. On or about August 7, 1975, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 4 from Charles Dean Stone to Edward G. Novotny and Etta B. Novotny,

as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied indicates that the purchase price was $16,000.00 (sixteen thousand dollars). See Exhibit 57.

16. Parcel 5 is located at 112 North Street, Cortez, Colorado. This parcel includes a 900 square foot house. On or about March 2, 1978, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado conveying Parcel 5 from Glenda C. Pool to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $19,000.00 (nineteen thousand dollars). See Exhibit 59.

17. Parcel 6 consists of 40 acres of vacant land and is located at 26058 Highway 145, Cortez, Colorado. On or about August 25, 1975, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 6 from John L. King and Ruth D. King to Edward G. Novotny and Etta B. Novotny as joint tenants, for the stated consideration of $10.0 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $56,000.00 (fifty-six thousand dollars). See Exhibit 61.

18. Parcel 7 is located at 29456 County Road U, Montezuma County, Colorado. The parcel includes a small cabin. On or about May 17, 1967, a Treasurer's Deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 7 to Edward G. Novotny and Etta B. Novotny. A true and correct copy of this Deed is attached to the Complaint as Exhibit 17. See also Exhibit 63.

C. The Federal Tax Liens

19. On or about June 23, 1993, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1989 and 1990 tax years. See Exhibit 65.

20. On or about June 23, 1993, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1989 and 1990 tax years. See Exhibit 66.

21. On or about March 1, 1995, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1991 tax year. See Exhibit 67.

22. On or about March 1, 1995, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado naming several entities, including the Trusts as nominees, alter egos, and/or transferees of Novotny with respect to the assessments made against him for the 1991 tax year. See Exhibit 68.

D. Colorado's Tax Lien

23. On December 13, 1999, the Montezuma County District Court entered judgment for Colorado against Novotny in the amount of $34,264 for unpaid state income tax and statutory additions for 1990 and 1991. See Exhibit 99-C. The state of Colorado recorded on December 15, 1999, a transcript of judgment docket with the clerk and recorder of Montezuma County. See id.

E. The Attempt to Transfer the Subject Property to Sunrise and Midwest

24. On August 3, 1979, Edward G. Novotny and Etta B. Novotny attempted to transfer the seven parcels of real property (described in paragraphs 10-16 above) to Midwest and Sunrise. The Novotnys attempted to transfer title to parcels 1, 2, 4, 5, and 6 to Midwest. See Exhibits 52, 54, 58, 60, and 62. The Novotnys attempted to transfer title to parcels 3 and 7 to Sunrise. See Exhibits 56 and 64.

25. In consideration of $10.00 (ten dollars) and 100 Trust Certificate Units ("TCUs") the Novotnys conveyed their interests in Parcels 1, 2, 4, 5, and 6 to Midwest Ltd. on June 1, 1979. In consideration of $10.00 (ten dollars) and 100 TCUs, the

Novotnys conveyed their interests in Parcel 3 and 7 to Sunrise on June 1, 1979. See Exhibits 72 and 76.

26. The documentary fee stamps applied when the Deeds to Parcels 1, 2, 4, 5, and 6 were recorded indicate that the Novotnys paid approximately $166, 000.00 (one hundred and sixty-six thousand dollars) for those five parcels of property. It is unclear what the Novotnys paid for Parcels 3 and 7.

27. This court has previously held that the attempted transfers of the seven parcels from the Novotnys to Midwest and Sunrise were ineffective as a matter of Colorado law, because Midwest and Sunrise failed to comply with section 38-30-166, C.R.S., the Colorado statute that permits trusts to hold title to real property. See Opinion, p. 29. This court further held that because title to all seven parcels was never transferred to Midwest and Sunrise, title to the seven parcels remains with Novotny and Etta Novotny, unless Midwest and Sunrise prevail in their quiet title actions. See Opinion, 99. 29-30.

F. Creation of Midwest and Sunrise

28. On June 1, 1979, for the purpose of estate planning and asset protection, the Novotnys formed two trusts, Midwest and Sunrise, by purchasing trust packages to form "family trusts" or "common law trusts" from a trust promoter named Lowell Anderson ("Anderson").

29. Anderson and several co-conspirators subsequently were indicted and charged with conspiracy to defraud the Government by selling common law trust packages designed to avoid the payment of federal income taxes. See United States v. Tranakos, 911 F.2d 1422, 1424 (10th Cir. 1990); see also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985); United States v. Anderson, 577 F.Supp. 223 (D. Wyo. 1983). Anderson died before trial, but his co-conspirators were convicted. See Tranakos, 911 F.2d at 1429.

1. Midwest: The "Trustees"

30. Midwest was governed by several trustees immediately

after its formation, including Novotny, Etta Novotny, Anderson, and Frank Pena ("Pena"). See Exhibit 82. In addition to these individual trustees, another trust also served as trustee of Midwest the Pioneer Trust through its trustee C.A. Anderson ("C.A. Anderson" as distinguished from "Anderson"). See id.

31. At the time Midwest was formed, the Novotnys barely knew Anderson or Pena, two of the first trustees.

32. After they were appointed as trustees of Midwest in April 1979, Novotny, Etta Novotny, and Pena resigned as trustees in August 1979. See Exhibit 82. After the Novotnys resigned as trustees, Anderson and Pioneer Trust, the remaining trustees, appointed Novotny as Midwest "manager" and Etta Novotny as the "assistant manager." See Exhibit 82.

33. In 1984, another trust, the Common Estates Company, was appointed as a trustee of Midwest. See Exhibit 82.

34. The Common Estates Company and Anderson shared the same address: P.O. Box 328, Greybull, Wyoming, 82426. See Exhibit 82.

35. In October 1985, Novotny and Etta Novotny were appointed as trustees of Midwest and Sunrise by the then current trustees, Anderson and Common Estates Company, both of whom resigned as trustees several days later. See Exhibits 82 and 84.

36. In September 1993, after the IRS issued a Notice of Deficiency to Novotny for the 1989 and 1990 tax years, the Novotny's resigned as trustees of Midwest and appointed Barbara Costello ("Costello") and Jimmy Chisum ("Chisum") as trustees. See Exhibit 82.

2. Sunrise: The "Trustees"

37. Sunrise, like Midwest, was governed by a number of trustees immediately after its formation, including Novotny, Etta Novotny, Anderson, C.A. Anderson, and Pena. See Exhibit 84.

38. It is unclear whether C.A. Anderson served as a trustee of Sunrise in her individual capacity or in her capacity as trustee

of the Pioneer Trust. See Exhibit 84.

39. At the time Sunrise was formed, the Novotnys barely knew Anderson or Pena, two of the first trustees.

40. After they were appointed as trustees of Sunrise in April 1979, Novotny, Etta Novotny, and Pena resigned as trustees in August 1979. See Exhibit 84.

41. Sunrise, unlike Midwest, did not have a "manager" or "assistant manager."

42. The Novotnys have been the only trustees of Sunrise since 1985.

G. Operation of Midwest and Sunrise

43. Novotny has been the "manager" of Midwest from 1979 to date. He maintains and repairs the five parcels that the Novotnys attempted to transfer to Midwest. He has not received compensation from Midwest for performing these services.

44. It is unclear what duties Etta Novotny performs as Midwest "assistant manager."

45. With the exception of the Novotnys and Costello's involvement with the house on 1112 North Street located on Parcel 5, none of the other individual trustees of Midwest or Sunrise has participated directly in managing any of the seven parcels. Costello's role with respect to the house on 112 North Street was primarily that of a renter who maintains the property in exchange for her use of the house.

46. While Chisum appears on trust documents as a trustee of Midwest, Chisum has not performed any duties as a trustee. Even though the Novotnys do not know where Chisum lives, he has not been replaced as a trustee. See Exhibit 82.

47. Neither Midwest nor Sunrise has made any distributions of principal or income to the designated beneficiaries. The designated beneficiaries are not even aware of the details of Midwest and Sunrise; several of them incorrectly think that they are "trustees" of Midwest and/or Sunrise.

48. Neither Sunrise nor Midwest has maintained financial statements.

49. Neither Midwest nor Sunrise has filed federal income tax returns since they were formed. See Exhibits 74, ¶ 2 and Exhibit 78, ¶ 2.

50. Neither Midwest nor Sunrise has maintained consistent and legitimate trust minutes. Indeed, many of the most important decisions regarding the subject property are not memorialized in the minutes. See Exhibit 82 and 84.

51. The Novotnys have not paid rent as such to Midwest or Sunrise for their use of any of the seven parcels.

52. Neither Sunrise nor Midwest has placed specific restriction on the Novotnys' use of the seven parcels.

53. Novotny and Etta Novotny make virtually all of the decisions concerning the seven parcels.

54. Midwest or Sunrise has paid the property taxes on each of the seven parcels from 1979 to the present. In those years when the Trusts had the money to pay the taxes, they did. In other years when the Trusts lacked the money to pay the taxes, the Novotnys paid them for the Trusts.

55. In June 1979, Novotny negotiated a lease with a rancher permitting him to use Parcel 6 for livestock grazing for $300.00 (three-hundred dollars) per year.

H. Parcel 3: The Residence and Business

56. In June 1979, Sunrise entered into an agreement to lease Parcel 3 to Midwest for the nominal rent of $10.00 (ten dollars) per year. Midwest has not paid any rent to Sunrise. See Exhibit 96. There does not appear to be any legitimate purpose for the lease.

57. Parcel 3 consists of the Novotnys' primary personal residence and approximately 50 acres of land that was used for Novotny's business, Four Corners Auto Parts and Salvage, until approximately 1990. Since 1979, the Novotnys have lived almost continuously in the residence located on Parcel 3, just as they had before they attempted to transfer it to Sunrise.

58. The Novotnys have not paid rent to either Midwest or Sunrise for their nearly continuous and extensive use of the

Parcel 3 residence. In lieu of rent, the Novotnys have secured, maintained, and improved the property. Additionally in any year in which the Trusts lacked the funds necessary to pay the required property taxes, the Novotnys either loaned the Trusts the money to pay the taxes or paid them for the Trusts, thereby eschewing the sale of Parcel 3 for delinquent taxes.

59. Neither Novotny nor his business, Four Corners Auto Parts and Salvage, has paid Midwest or Sunrise rent for the use of the portion of Parcel 3 that was devoted to the auto parts and salvage business. Again, in lieu of rent, Novotny has secured, maintained, and improved the property. This portion of Parcel 3 has been free from waste and trespass during Novotny's use and occupancy.

60. Novotny, in conjunction with the sale of scrap metal to Copperstate Metals, Inc., leased Parcel 3 ostensibly on behalf of Midwest to David Zack ("Zack") of Copperstate Metals, Inc., for approximately two-to-three years. See Exhibit 20.

61. Novotny, purportedly acting as the manager of Midwest, negotiated the lease of Parcel 3 with Zack. The lease required monthly lease payments in the cash equivalent of 1,200 Federal Reserve Notes, which the lease specified was $225.00 (two-hundred and twenty five dollars). The lease required that the monthly lease payments be made in cash or money order. See Exhibit 20.

62. The lease payments were made by money order directly to Novotny in his name, not to Midwest. See Exhibit 21. However, the rent was expended by the Novotnys ostensibly for the benefit of Midwest.

63. Novotny, purportedly acting as manager of Midwest, wrote Zack on several occasions concerning late payment of rent. See Exhibits 23-26; 28-34.

64. When Copperstate Metals, Inc., tried to pay the monthly lease payment with a check, Novotny returned it to Copperstate Metals, and wrote a letter reminding Zack that the lease agreement required the payments be made in cash or money order.

See Exhibit 27. Novotny wrote "I know that this will cause some inconvenience, but it could cause me a great deal more if it is not done that way." Id.

65. Despite the fact that Novotnys had purportedly transferred Parcel 33 to Sunrise, which then purportedly leased it to Midwest, it was Novotny, supposedly acting as manager of Midwest, who gave Zack the option to purchase Parcel 3. The option to purchase the property was open for the duration of the lease with Copperstate Metals, Inc. See Exhibit 20.

66. The lease between Midwest and Sunrise did not provide Midwest with the authority to sublet Parcel 3 or to offer it for sale. See Exhibit 96. There is nothing in the trust minutes reflecting a decision by the trustees of Midwest or Sunrise to grant Mr. Zack, or any other party, and option to purchase Parcel 3. See Exhibits 82 and 84.

67. Novotny, purportedly acting as the manager of Midwest, drafted a contract that provided for the sale of the entire inventory of Four Corners Auto Parts and Salvage, including used cars, classic cars, new and used automotive parts, and junk cars, from Midwest to Copperstate Metals. See Exhibit 20. There is no record, however, that Four Corners Auto Parts and Salvage, or its principal Novotny, ever sold, gifted, or otherwise transferred the entire inventory of new, used, and junk vehicles and auto parts to Midwest.

I. Parcel 2: The Commercial Rental Property

68. Parcel 2 consists of two commercial buildings located at 483 and 485 Broadway in Cortez, Colorado.

69. Novotny managed and controlled Parcel 2 before the Novotnys attempted to transfer it to Midwest, and he continued to manage and control it in the same manner after the attempted transfer, despite never receiving compensation from Midwest.

70. An unrelated third party, James Rodd ("Rodd"), leased Parcel 2 from Midwest from approximately 1979 until approximately 1994 pursuant to an oral lease agreement with Novotny

dating to 1979. See Exhibit 95. During the term of this lease, Rodd operated an auto repair business from the commercial parcel.

71. When Rodd stopped paying for rent for Parcel 2, Novotny filed a document titled "Equity Claim and Interest" with the Montezuma County Recorder for the unpaid rent allegedly owned by Rodd for use of Parcel 2. See Exhibit 95. The "Equity Claim and Interest" provides that "this claim and interest is assignable by Edward G. Novotny to any person/citizen or to any assignee(s) or heirs(s)." See id. Early on in this document Novotny states that he is acting for and on behalf of Midwest. See id.

J. The Financial History of Midwest Limited

72. When Midwest maintained a bank account, Novotny was a signatory on that account, and he authorized payment of Midwest's bills. See Exhibits 7, 8, 11, 12, and 87. Novotny's wife and curiously his daughter were also signatories on Midwest's bank accounts. See Exhibits 7 and 8. There is no indication that trustees of Midwest, other than the Novotnys, ever were signatories on its bank accounts. See Exhibits 7 and 8.

73. Novotny also used Midwest's bank account to pay personal bills and expenses, including his gas bill and electric bill. See Exhibit 87. Novotny wrote checks from that account to the Tenth Circuit Court of Appeals and to a court reporter in conjunction with a federal criminal case in which he was convicted of illegally removing timber from a national forest. See Exhibit 87, pp. 00030 and 00038; see also United States v. Novotny, 968 F.2d 22 (10th Cir. 1992) (unpublished). He also wrote checks from Midwest's bank accounts to West Publishing, See Exhibit 87, pp. 00053 and 00062. He wrote numerous checks in large dollar amounts from Midwest's bank account to himself and to his business, Four Corners Auto Parts and Salvage. See Exhibit 87. He wrote checks from Midwest's bank accounts to various individuals and businesses. See Exhibit 87, p. 00070

(check to Jim Crosby marked "loan"), p. 00094 (check to his daughter), and p. 00133 (check to the "Computer Corner"). Novotny even wrote a check from Midwest's bank account to the publication called the "Justice Times" for a two-year subscription. See Exhibit 87, p. 00044. These expenditures could represent partial repayment of monies loaned out of financial necessity by the Novotnys to Midwest. However, from the extant and scant paper trail it is impossible to determine who was owed what at any given time. Clearly, Novotny assumed he had carte blanch to use Midwest funds however he deemed necessary without discussion with or authorization by other trustees.

74. Because any Midwest bank accounts became potentially subject to levy and seizure by the IRS and/or Colorado, Novotny maintained a cash box in his house where he kept cash to pay bills associated with the seven parcels on behalf of the Trusts.

75. The Novotnys have loaned approximately $17,500.00 (seventeen thousand and five hundred dollars) of their own funds to Midwest although the loan, or series of loans, is not formally discussed or authorized in the trust minutes See Exhibit 82. The Novotnys have not charged interest to Midwest. The loan has not been documented, e.g., as in a promissory note, and is unsecured.

76. The rental income from Parcel 2 has been used to pay expenses associated with all seven parcels, including those purportedly owned by Sunrise.

77. When the rent from Parcel 2 has not been sufficient to pay the expenses, such as property taxes, associated with the seven parcels, Novotny and/or his wife have paid these bills with their personal funds to insure survival of the Trusts and their assets for the benefit of the trust beneficiaries as well as themselves.

78. Sunrise has never had a bank account or source of income. It appears that the expenses related to the property held by Sunrise were either paid with the rental income from Parcel

2 or with Novotny's personal funds or with funds from Four Corners Auto Parts and Salvage. See Exhibit 38, p. 9, ¶ 7.

CONCLUSIONS OF LAW

A. Jurisdiction

1. The Government seeks to reduce to judgment federal income tax assessments against defendant Novotny and to foreclose federal tax liens against seven parcels of real property ("The subject property"). Defendant Colorado has filed cross-claims against the defendants seeking to foreclose its tax liens against the seven parcels of real property to satisfy a judgment entered in the Montezuma County District Court, case No. 99-CV-202 in favor of Colorado against Novotny for unpaid 1989 and 1990 Colorado income taxes, penalties, and interest. Midwest and Sunrise filed counterclaims seeking to quiet title to the subject property in their names. Defendant Etta Novotny filed a counterclaim seeking to quiet title to her interest in the seven parcels

2. The Court has jurisdiction over the Government's action to reduce the federal income tax assessments to judgment and foreclose the federal tax liens pursuant to 26 U.S.C. § 7402 and 28 U.S.C. 1340 and 1345. The Court has personal jurisdiction over each of the defendants.

3. The Court has jurisdiction over the quiet title claims of defendants Midwest, Sunrise, and Etta Novotny, pursuant to 28 U.S.C. § 2410. In her counterclaim against the United States, Etta Novotny also seeks to enjoin the tax assessments at issue. This claim is barred by the Anti-Injunction Act, 26 U.S.C. § 7421. See, e.g., Stafford v U.S., 208 F.3d 1177, 1179 (10th Cir. 2000) (actions challenging enforcement of tax liens are barred under 26 U.S.C. § 7421). To the extent Etta Novotny asserts a claim for damages against the government, the claim is barred by sovereign immunity. Etta Novotny has not demonstrated that the Government has waived sovereign immunity as to this claim.

B. Edward Novotny's Federal Income Tax Liability.

4. This suit is based upon IRS assessments against defendant Novotny for unpaid federal income taxes, penalties, and interest as reflected on the Certificates of Assessments and Payments, plus accrued but unassessed statutory additions to tax. See Exhibits 1, 2, and 3.

5. A Certificate of Assessments and Payments is admissible pursuant to Fed. R. Evid. 803 (8).

6. An assessment of taxes, when properly certified, is presumptively correct evidence of a taxpayer's liability and satisfies the Government's burden of proof so that the Government may rest its case. See United States v. Janis, 428 U.S. 433, 440-441 (1976); Anderson v. United States, 561 F.2d 162, 165 (8th Cir. 1977).

7. It is well established that a Certificate of Assessments and Payments is sufficient evidence that the assessments were made in the manner prescribed by 26 U.S.C. § 6203 and the accompanying regulations. See Long v. United States, 972 F.2d 1174, 1181 (10th Cir. 1992); United States v. Chila, 871 F.2d 1015 (11th Cir. 1989); United States v. Miller, 318 F.2d 637,639 (7th Cir. 1963); United States v. Schaeffer, 245 B.R. 407, 84 A.F.T.R.2d 99-5786 (Colo. 1999) (Nottingham, J.,).

8. An assessment of tax as well as an assessment for failure to file tax returns and make estimated tax payments are entitled to a presumption of validity. See United States v. Dixon, 672 F. Supp. 503 (M.D. Ala. 1987), aff'd 849 F.2d 1478 (11th Cir. 1988) (Certificate of Assessments and Payments sufficient of establish that taxpayer was liable for taxes, penalties, and interest).

9. The Certificates of Assessments and Payments establish that: (1) the federal income taxes, penalties and interest were assessed (Sections 6201-6203 of the Internal Revenue Cod); (2) notice and demand for payment of these taxes, penalties, and interest were properly made (Section 6303(a) and 6321 of the Internal Revenue Code); and (3) the taxpayer is presumptively liable for the unpaid taxes, penalties, and interest shown

on the Certificate. See Schaeffer, supra.

10. Novotny has the burden of presenting admissible evidence to rebut the presumption of correctness accorded the Certificates of Assessments and Payments. See United States v. Gosnell, 961 F.2d 1518, 1519 (10th Cir. 1992), quoting Jones v. Commissioner, 903 F.2d 1301, 1303 (10th Cir. 1990).

11. This Court ruled on the Government's Motion for Summary Judgment and held that the Government has established Novotny's income for the years at issue. See Opinion, pp. 18-20. The Court held that the sole remaining issue to be addressed at trial is whether Novotny is entitled to reduce this income by establishing that he is entitled to deduct business expenses that may be related to Four Corners Auto Parts and Salvage. See Opinion, p. 20.

12. A taxpayer bears the burden of showing that he is entitled to deductions from income. See INDOPCO, Inc., v. Commissioner, 503 U.S. 79 (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934).

13. With respect to claimed business expenses, Novotny "bears the burden of substantiating the amount and purpose of the item for the claimed deduction." Ashley v. Commissioner, 80 TCM 841, 2000 WL 1839373 (2000).

14. Novotny has repeatedly advanced the untenable position that he is immune from federal taxation. To the extent his arguments are decipherable, a representative sampling includes the following: he has not entered into a written agreement with the federal government that would subject him to taxation; he is not the type of person required to file a tax return; the tax system is voluntary; he is not a federal employee; and he has returned the bills (notices of deficiency) sent to him by the Internal Revenue Service with dishonor. Novotny's contentions are frivolous and have been explicitly rejected by the courts. See Lonsdale v. United States, 919 F.2d 1440, 1448 (10th Cir. 1990).

15. Novotny is not entitled to claim any business expenses

as deductions against his gross income for the tax years 1989, 1990, or 1991. Novotny has not presented sufficient evidence to establish that he is entitled to any such deductions.

16. The Certificate of Assessments and Payments for the tax year 1989 is correct. Novotny is indebted to the United States for the amounts reflected in the Certificate of Assessments and Payments for the tax year 1989, plus interest and statutory additions calculated through June 3, 2002.

17. The Certificates of Assessments and Payments for the tax years 1990 and 1991 are correct. Novotny is indebted to the United States for the amounts reflected in the Certificates of Assessments and Payments for the tax years 1990 and 1991, plus interest and statutory additions calculated through June 3, 2002.

18. As of June 3, 2002, the first day of trial in this matter, Novotny owed the United States $383,446.33 (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) in unpaid taxes and statutory additions for the 1989, 1990, and 1991 tax years.

C. The Federal Tax Liens Should Be Foreclosed Upon the Seven Parcels of Subject Property.

1. The Federal Tax Liens.

19. Section 6321 of Title 26 of the United States Code provides that after (1) assessment of tax and (2) notice and demand for payment, a lien arises in favor of the Government in the amount of the assessment. The tax lien is all encompassing; it attaches to all property and rights to property belonging to the taxpayer on the date the lien arises. See 26 U.S.C. § 6321 and 6322. In addition, the federal tax lien attaches to any property interest subsequently acquired by the taxpayer while the federal tax lien remains in force. See Glass City Bank v. United States, 326 U.S. 265, 267-68 (1945).

20. The tax lien continues in full force until the liability is paid in full or becomes unenforceable due to lapse of time. See 26 U.S.C. § 6323; see also United States v. Cache Valley Bank,

866 F.2d 1242, 1244 (10th Cir. 1989). A federal tax lien is perfected upon assessment and no further action need be taken. See United States v. Vermont, 377 U.S. 351, 352 (1964).

21. Federal tax liens arose against Novotny when the IRS made assessments against him for unpaid federal income tax liabilities for the 1989, 1990, and 1991 tax years in May of 1993 and November of 1994. See Exhibits 1 and 2. The IRS recorded the corresponding Notices of Federal Tax Lien with respect to the 1989 and 1990 tax years on June 23, 1993. The IRS recorded the corresponding Notice of Federal Tax Lien with respect to the 1991 tax year on March 1, 1995.

2. Foreclosure of Federal Tax Liens - Generally.

22. Novotny has an interest in the seven parcels against which the federal tax liens may be foreclosed. Because Midwest and Sunrise failed to comply with recording requirements under Colorado law that permit trusts to take and hold title to real property, the attempted transfers of the seven parcels from Novotny and Etta Novotny to Midwest and Sunrise were ineffective as a matter of Colorado law. Thus, title to the seven parcels remain with the Novotnys. Even if the trusts did hold title to the seven parcels, the federal tax liens may nevertheless be foreclosed for three reasons: (1) Midwest and Sunrise hold the seven parcels as nominees of Novotny; (2) Midwest and Sunrise should be disregarded because they are shams; and (3) Midwest and Sunrise are alter egos of Novotny.

3. The Trusts Did Not Comply With the Colorado Recording Requirements That Permit Trusts to Hold Title To Real Property.

23. This Court has previously held that, as a matter of Colorado law, the attempted transfers of the seven parcels from Etta Novotny and Novotny to Midwest and Sunrise were ineffective and that the trusts never took title to the property. See Opinion, p. 29-30. Thus, title to the seven parcels has remained with the Novotnys, despite the attempted transfers, Novotny had an undivided one-half interest in the seven parcels to which the

federal liens attached when they arose in May 1993 and November 1994, and to which the state tax lien attached on December 15, 1999. The federal and state tax liens against Novotny have not expired or been released and thus remain attached to the property. See United States v. Cache Valley Bank, supra.

4. Midwest and Sunrise Are Nominees of Edward Novotny.

24. It is firmly established that the Government may foreclose its federal tax liens on property held by the nominee of a taxpayer in order to collect the taxpayer's liability. See United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1036 (10th Cir. 1974); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728-729 (11th Cir. 1989); United States v. Schaeffer, 245 B.R. 407, 84 A.F.T.R.2d g 99-5209 (D. Colo. 1999) (Nottingham, J.); United States v. Stonier, 73 A.F.T.R.2d g 94-971 (D. Colo. 1994), aff'd by unpublished decision 48 F.3d 1233 (10th Cir. 1995), cert. denied, 516 U.S. 1183 (1996); Cityview Trust v. United States, 98-2 USTC g 50-872, 1998 WL 1031525 (D. Wyo. 1998).

25. This Court has held that **whether analyzed under state or federal law**

"[t]he following considerations are relevant in determining whether an individual or a corporation holds property as the nominee of another: (1) the lack of consideration paid by the nominee; (2) the control exercised over the property by the transferor while the title is in the nominee's name; (3) the close relationship between the transferor and the nominee; (4) the use by the transferor of the transferred property; and (5) lack of interference in transferor's use of property by the nominee." Stonier, 73 A.F.T.R. 2d $ 94-971 at p. 94-2087, aff'd by unpublished opinion 48 F.3d 1233 (10th Cir. 1995), cert. denied, 516 U.S. 1183 (1996).

26. Additionally, courts sometimes consider whether the property was placed in the name of a nominee in anticipation of a suit or the occurrence of liabilities. See Cityview Trust v. Hutton, 98-2 USTC p 50,872, 1998 WL 1031525 (D. Wyo.

1998).

27. A review of the factors to be considered in making a nominee determination requires a finding that Midwest and Sunrise hold the subject property as nominees of Novotny.

28. First, despite the attempted transfer of the subject property to Midwest and Sunrise, Novotny continued to exercise virtually complete dominion and control (the second factor) over the seven parcels. The exercise of dominion and control is the key factor in determining whether a nominee situation exists. See Stonier, supra. He continued to use Parcel 3 as his residence and even operated his business from it. Novotny did not pay rent to either Midwest or Sunrise for his extensive use of Parcel 3.

29. With respect to all seven parcels, little or nothing changed after the Novotnys attempted to transfer them to Midwest and Sunrise. Novotny's use and enjoyment of the property was not restricted in any way by the trusts. He controlled and managed the improved parcels for his benefit just as he had prior to the attempted transfers, despite the fact that he did not receive any compensation from the trusts.

30. With respect to Parcel 6, which consists of raw land, Novotny negotiated the lease allowing a rancher to use it for grazing. There is no evidence that any individual or entity other than Novotny and/or his wife, regardless of any designation on trust documents, exercised any significant dominion or control over the seven parcels.

31. Second, there is and was a close relationship between the transferor and nominee (the third factor). Novotny, with the assistance of the trust promoters, created Midwest and Sunrise. He was a signatory on Midwest's bank account (when Midwest had a bank account). He makes disbursements related to the subject property. He has used his own personal funds to pay expenses related to property purportedly held in the names of the trusts. He also paid his own personal bills and expenses with funds from Midwest's bank account. After Midwest stopped

maintaining a bank account, expenses for the subject property were (and continue to be) paid out of a cash box which Novotny maintains and controls.

32. The fourth and fifth factors in a nominee determination are (4) the use by the transferor of the property transferred to the nominee and (5) the nominee's lack of interference with the transferor's use of the property. The evidence unequivocally establishes that the fourth and fifth factors also apply because Novotny has exercised complete dominion and control over the seven parcels since the attempted transfers. See Shades Ridge Holding Co., 888 F.2d at 728 (nominee determination hinges on who has active or substantial control). Novotny has continued to use the putatively transferred property for his benefit without any interference from the trusts. He lived on one of the parcels and operated his salvage yard from it. With respect to the other parcels, he has continued to make virtually all of the decisions concerning their use. Neither Midwest nor Sunrise has interfered with Novotnys' use of the property in any way. While several of the parcels of subject property are undeveloped, to the extent that they have been used, Novotny has determined and controlled their use. For example, one parcel has been leased to a rancher by Novotny.

33. With respect to the sixth factor, Novotny stopped filing federal income tax returns and paying federal income taxes in 1979, the same year that the Novotnys attempted to transfer the subject property to Midwest and Sunrise.

34. In sum, because Novotny decided to form Midwest and Sunrise; attempted to transfer the seven parcels to the trusts, but continued to use the property for his own benefit as if the attempted transfers had never occurred; and exercised almost complete dominion and control over the seven parcels after the attempted transfers, Midwest and Sunrise must be considered nothing more than his nominees or alter egos. There is no evidence that the seven parcels were used by, or managed for the benefit of, anyone other than Novotny and Etta Novotny.

5. Midwest and Sunrise Are Shams.

35. Courts have routinely held that so-called "family trusts" that are similar or identical to the trusts in the instant case are nullities for federal and state tax purposes.

36. Courts have uniformly rejected taxpayers' attempts to limit their tax liability by assigning income to such trusts, and then having the trusts deduct payments to the taxpayers as expenses, finding the trusts to be shams lacking any substance. See Holman v. United States, 728 F.2d 462, 465 (10th Cir.1984); United States v. Krall, 835 F.2d 711, 714 (8th Cir. 1987); Joe G. Schneider, 54 TCM 1044 (1987).

37. Courts also have found trusts, similar if not identical to the instant ones, that were controlled by the taxpayers to be shams, and have permitted the Government to use assets held by these trusts to satisfy the tax liability of the individual taxpayer who transferred the assets to the trust. See F.P.P. Enters. v. United States, 830 F.2d 114, 115-117 (8th Cir. 1987); James E. Edwards Family Trust v. United States, 572 F. Supp. 22, 24-25 (E.D.N.M. 1983). Here, although Novotny did not attempt to assign income to the trusts (deciding instead that he was altogether immune from taxation), the trusts should similarly be disregarded as shams.

38. In F.P.P. Enters. v. United States, 830 F.2d 114, 115 (8th Cir. 1987), the taxpayers transferred their property to trusts promoted by Anderson in exchange for "trust certificate units." Id. at 116. The Government levied on property titled in the name of the trusts to collect the individual taxpayers' liability. In upholding the District Court's determination that the trusts were shams, the Eighth Circuit noted:

> The trusts here are without economic substance. Soester as "creator" and the Andersons as "trustees" established "paper trust" entities on December 21, 1978. Soester never held or contributed any of the real property placed in the trusts. Instead, the property was conveyed by the Beasons to the trusts approximately four months later.

> The Beasons continued to treat the property in exactly the same manner after the transfers as they did before that time, quite simply, as their own. The trust property may therefore be levied on to satisfy the Beason's tax liability.

F.P.P. Enters., 830 F.2d at 117.

39. The situation in the instant case is identical to that faced by the Eighth Circuit in F.P.P. Enters. "Paper trusts" were created for the Novotnys. The Novotnys then attempted to transfer the seven parcels to Midwest and Sunrise and continued to treat the property as their own after the attempted transfers.

40. F.P.P., supra, is particularly instructive because the Government argued, and the District Court and Eighth Circuit agreed, that even if the entities were considered valid trusts under Nebraska law, they should not be considered entities separate from the taxpayer. F.P.P. Enters., supra, 830 F.2d at 117-118 (because trusts were shams and shells acting as alter egos they were not entities separate from the taxpayer). Therefore, as in F.P.P. Enters., supra, the trusts in the instant case are shams.

41. The defendant trusts' central argument - that a taxpayer's interest in property is limited by state law - does not override the well-established doctrine that, for federal and state income tax purposes, an entity may be disregarded if it lacks any economic reality. Furthermore, of central importance here, state law does not prohibit the United States or Colorado from establishing that a taxpayer has a beneficial interest in property held by an entity that is a sham, or is the taxpayer's nominee or alter ego. See ¶¶ 28 - 49, herein.

42. Indeed, the Trusts' argument that the Government and Colorado cannot foreclose upon the subject property because the trusts may be considered valid under state law would effectively eviscerate the doctrine of nominee and sham trust. The logical result of accepting the trusts' position would be to elevate form over substance. It would permit any taxpayer to avoid collection of unpaid federal and state income taxes merely by

placing his real property and other valuable assets into a trust that satisfies state-law formalities, even if the taxpayer continued to use and enjoy the property as if it were his own.

43. The evidence establishes that Midwest and Sunrise are nothing more than sham trusts and that Novotny has a beneficial interest in the seven parcels purportedly held by these sham trusts that may be foreclosed upon by the Government and Colorado.

6. Midwest and Sunrise Are Alter Egos of Edward Novotny.

44. When an entity is so dominated by a taxpayer that it does not have a separate and independent existence, it is considered be an alter ego of the taxpayer. G.M. Leasing Corp. v. United States, 514 F.2d 935 (10th Cir. 1975), rev'd on other grounds, 429 U.S. 338 (1977); Lemaster v. United States, 891 F.2d 115, 119-120 (6th Cir. 1989). The Government may use the assets held by the alter ego of a taxpayer to satisfy the taxpayer's federal tax liabilities. Id.

45. Midwest and Sunrise are so dominated by Novotny that they have no separate existence from him and, accordingly, are his alter egos. See United States v. Gosnell, 961 F.2d 1518 (10th Cir.1992).

46. As discussed in detail above, Novotny, despite the attempted transfer of the subject property to Midwest and Sunrise, continues to treat the subject property as his own.

47. Various individuals like Anderson and Chisum have been listed as trustees, but they do not perform duties for the trusts. Indeed, Novotny does not even know where Chisum, purportedly a trustee, is located. Despite his lack of participation, Chisum has not been replaced as a trustee.

48. Trustee meetings are sporadic or non-existent.

49. The trusts have not filed federal income tax returns.

50. The individuals listed as trust beneficiaries have had little or no involvement with the subject property and have received no distributions since the formation of Midwest and Sunrise in 1979.

D. Dismissal of the Trusts' Quiet Title Actions.

51. Midwest and Sunrise have asserted quiet title claims in an attempt to defeat the federal and state tax liens. The trusts' attempt to defeat the federal and state tax liens through their quiet title claims must fail because Midwest and Sunrise cannot satisfy the elements of the quiet title claims that they asserted.

1. Midwest and Sunrise Cannot Satisfy The Elements of Their Quiet Title Claims.

52. Midwest and Sunrise asserted quiet title claims pursuant to §38-41-108 and §38-41-111, C.R.S.

53. In order to prevail under §38-41-108, C.R.S., Midwest and Sunrise must prove that: (1) they have been in actual and exclusive possession of the seven parcels of subject property; (2) under claim and color of title made in good faith; (3) for a period of seven successive years; and (4) they paid taxes on the seven parcels during that period. See §38-41-108, C.R.S.; see also Peters v. Smugler Durant Mining Co., 930 P.2d 575, 579-80 (Colo. 1997); Ginsburg v. Stanley Aviation Corp., 568 P.2d 35 (Colo. 1977). Midwest and Sunrise must show that they have satisfied all these elements prior to the time that the federal tax liens attached to the subject property.

54. Midwest and Sunrise have not had actual and exclusive possession of the seven parcels. Instead, as discussed extensively above, despite the attempted transfers, the Novotnys retained possession of and exercised virtually complete dominion and control over all seven parcels.

55. Second, the Trusts' claim to the subject property was not made in good faith. The Novotnys attempted to transfer the seven parcels to Midwest and Sunrise at about the same time that Novotny decided to opt out of the federal income tax reporting and payment system. Midwest and Sunrise cannot be considered to have acted in good faith because, at their core, they are merely sham entities that the Novotnys created in a thinly veiled attempt to shield their assets from legitimate credi

tors like the Government.

56. Third, although Midwest and Sunrise can show that the real property taxes for the seven parcels have been paid for seven years, they cannot escape the ineluctable conclusion that they were the nominees and alter egos of Novotny since shortly after their formation, if not as of their creation. Sunrise never had a bank account or assets from which it could pay taxes. The evidence shows that the Novotnys used rental payments from parcel two and their personal funds to pay expenses for all of the properties, including taxes. Importantly, because Midwest and Sunrise cannot be said to have an existence separate from Novotny, they cannot be considered to have paid any taxes. Instead, only Novotny can be considered to have paid the taxes related to the subject property.

57. To establish ownership of property under §38-41-111, C.R.S., the Trusts must prove (1) actual ownership of the seven parcels, and (2) that the deeds conveying the property were recorded for a seven-year period. See §38-41-111, C.R.S.; see Ginsburg v. Stanley Aviation Corp., 568 P.2d 35, 38 (Colo. 1977); Cavat v. Juhan, 206 P.2d 600 (1949).

58. Midwest and Sunrise cannot establish the elements necessary for a successful quiet title claim pursuant to §38-41-111, C.R.S. Midwest and Sunrise never had actual and continuous possession of the seven parcels. These trusts were shams and the nominees and alter egos of Novotny. The Novotnys maintained possession of, and exercised virtually complete dominion and control over, the seven parcels despite their ostensible attempt to transfer them to Midwest and Sunrise.

2. The Relationship Between The Trusts' Counterclaims to Quiet Title And The Taxing Authorities' Sham, Nominee, And Alter Ego Theories

59. Even assuming *arguendo* that the evidence had been sufficient to sustain the Trusts' counterclaims to quiet title, the federal and state taxing authorities are not precluded from asserting their theories of nominee, alter-ego, and sham because

of the state law statues of limitation concerning actions to set aside a ~~conv~~eyance or deed.

60. The relevant portions of §38-41-111(1), C.R.S., place a time limit on actions to "question or attack the validity of or to set aside... any instrument of conveyance or deed." If the party claiming title is in possession of the property and the document has been recorded and remained of record for seven years, an action to set aside the document or render it inoperative is barred. (Emphasis added). Of course, if the Trusts were able to establish title under §38-41-108 or §38-41-111, C.R.S., they would own the relevant parcel or parcels. If the bar of § 111 were applicable, the Government could not "question or attack the validity of... (the) instrument of conveyance or deed" under which the Trusts claim title.

61. A claim that the Trusts are shams, or are nominees of or alter egos of Novotny, is not an attack on the validity of the conveyances to the Trusts or the validity of the recorded deeds supporting the Trusts' claims of ownership. Rather, a sham, nominee, or alter ego claim is an attack on the validity of the Trusts as independent entities. For example, if the Trusts are alter egos of Novotny, the actions and holdings of the Trusts are the actions and holdings of Novotny. When an alter ego theory has been proven, "a court will disregard (the alter ego entity)... and consider the actions ostensibly taken by the (alter ego entity) to be those of the (underlying entity)." *Double B Trading Co, Inc.*, 893 P.2d at 1362. Here, Novotny is the underlying entity.

62. Under these theories, if the Trusts own the property, Novotny owns the property. In other words, claims that the Trusts are shams, nominees, or alter egos can be asserted even when operating under the assumption that the Trusts hold valid title to the properties. These theories simply posit that the valid property interests of the Trusts amount to valid property interests of Novotny; that any property owned by the Trusts is, legally, property of Novotny. This is so because, as shams, nomi

nees, or alter-egos, the Trusts are, in reality, the same as Novotny.

63. In short, proof that the Trusts are shams, or are nominees or alter egos of Novotny is, in essence, proof that the Trusts are Novotny. If the Trusts are Novotny, the Trusts' property is Novotny's. There is ample authority for the proposition that the federal and state government can collect taxes by levying on property held by a nominee or alter ego of the taxpayer.

64. The Government's alter ego, sham, and nominee theories are not barred by § 38-41-111(1), C.R.S. Section 38-41-111(1), C.R.S., limits only claims that question or attack the validity of the instrument of conveyance or deed under which the Trusts claim title. The limitation of §38-41-111(1), C.R.S., is not applicable to the Government's sham, nominee, and alter ego claims because these claims do not question or attack the validity of an instrument of conveyance or deed under which the Trusts claim title. Rather, these theories assert that any valid claim of title of tile held by the Trusts flows through to Novotny.

E. Colorado's Tax Lien And Concomitant Foreclosure

65. On December 13, 1999, the Montezuma County District Court entered judgment for Colorado against Novotny in the amount of $34,264 (thirty-four thousand, two-hundred and sixty-four dollars) for unpaid state income tax and statutory additions for 1990 and 1991. The state of Colorado recorded a transcript of judgment docket with the clerk and recorder of Montezuma County on December 15, 1999. Therefore, Colorado has a valid tax lien against any property in which Novotny has a legal or equitable interest. This tax lien is subordinate and junior to that of the Government. For the reasons discussed above, the Trusts do not hold title to the seven parcels of property. Rather, the Novotnys hold title to the seven parcels of property. Further, even if the Trusts did hold title to the properties, those property interests would flow through to the Novotnys because the Trusts holding paper title to the subject seven parcels of real property have been found to be shams and the nominees and alter egos of Novotny. As a result, Colorado may en

force its tax lien against Novotny's undivided one-half interest in that real property.

F. Mrs. Novotny's Quiet Title Claim

66. As part of her quiet title claim, Etta Novotny claims that, if the Trusts are found not to hold valid title to the properties, that she holds an undivided one-half interest in the properties, in joint tenancy with Novotny. The Government does not dispute this claim, and the record supports this claim. The properties originally were conveyed to Novotny and Etta Novotny as joint tenants. Because the Trusts' claim of title to the properties is invalid, the Novotny's continue to hold title to the properties as joint tenants.

67. Etta Novotny is entitled to judgment quieting title to her interest in each of the seven parcels. This judgment shall reflect that Mrs. Novotny holds title to the properties in joint tenancy with Novotny, and that Etta Novotny holds an undivided one- half interest in each of the properties.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That judgment be entered against Edward G. Novotny and in favor of the Government with respect to the 1989, 1990, and 1991 tax years in the amount of $383,446.33, (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) plus interest and statutory additions as provided by law from June 3, 2002;

2. That judgment shall enter in favor of Etta Novotny on her quiet title claim. The judgment shall decree that Etta Novotny holds title to the to the seven parcels of real estate described in this Order in joint tenancy with Novotny, and that Etta Novotny holds an undivided one-half interest in each of the properties;

3. That the federal and state tax liens are foreclosed against the seven parcels of real property described above;

4. That the seven parcels shall be sold by the United States Marshal, with one half of the net sale proceeds to be applied first to Edward G. Novotny's federal tax liability, and if this

liability is satisfied and funds remain, then to Edward G. Novotny's Colorado state tax liability; the other half of the net proceeds to be paid to Etta Novotny;

5. That a deficiency judgment shall be entered against Edward G. Novotny in favor of the United States of America if the proceeds of the sale do not satisfy his federal tax liabilities;

6. That a deficiency judgment shall be entered against Edward G. Novotny in favor of the Department of Revenue, State of Colorado if the proceeds of the sale do not satisfy Novotny's state tax liabilities;

7. That the counterclaims and cross-claims of defendants Midwest and Sunrise are DISMISSED WITH PREJUDICE;

8. That the counterclaims and cross-claims of Etta Novotny, other than the quiet title counterclaim described in paragraph four (4), above, are DISMISSED WITH PREJUDICE;

9. That the Government and the State of Colorado shall recover their costs and shall submit a bill of costs within eleven (11) days of the date of this Order; and

10. That the Government shall submit a proposed Order of Foreclosure and Decree of Sale within 45 (forty-five) days.

DATED: July 3, 2002.

BY THE COURT:

Bob Blackburn

Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 99-RB-2196 (PAC)

The undersigned certifies that a copy of the foregoing Memorandum Opinion and Order was served on July 3, 2002, by:

(X) delivery to:

Magistrate Judge Partricia A. Coan

Robert D. Clark
Assistant Attorney General
D.C. Box 20

U.S. Attorney's Office

( ) by electronic mail to the addressed to:

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

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Etta B. Novotny
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
SEP 14 2001
JAMES R. MANSPEAKER
CLERK

Civil Action No. 99-D-2196
UNITED STATES OF AMERICA,
Plaintiff(s),

v.

EDWARD G. NOVOTNY, in his individual capacity, as Trustee of MIDWEST LIMITED and as Trustee of SUNRISE INVESTMENTS, ETTA B. NOVOTNY, and STATE OF COLORADO, DEPARTMENT OF REVENUE,
Defendant(s).

MEMORANDUM OPINION AND ORDER

Patricia A. Coan, United States Magistrate Judge

This is an action by the United States to reduce outstanding federal tax assessments against Edward Novotny to judgment and to foreclose federal tax liens on certain real property, under 26 U.S.C. § 7401 and 7403. Jurisdiction exists under 26 U.S.C. § 7402 and 28 U.S.C. § 1340 and § 1345. The matters before the court are the United States' Motion for Summary Judgment [originally filed on December 22, 2000],[1] and Defendants Midwest Limited and Sunrise Investments' Motion for Summary Judgment [filed September 28, 2000]. On June 11, 2001, the parties consented to final disposition of the motions by the undersigned magistrate judge under 28 U.S.C. 636(c). The court heard oral argument from the parties on June 11, 2001. The motions are ripe for disposition.

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[1] The United States originally filed the Motion for Summary Judgment on December 22, 2000. On January 3, 2001 the district judge ordered that the motion be stricken and granted leave to refile. The United States' Motion for Summary Judgment, as originally filed, was reinstated on January 19, 2001.

I

The United States ("Government") seeks to reduce outstanding federal tax assessments against Edward Novotny to judgment and to foreclose federal tax liens on seven parcels of real property titled to defendants Midwest Limited and Sunrise Investments. The United States has moved for summary judgment on those claims. Defendants Midwest Limited and Sunrise Investments (collectively referred to as "Trust defendants" or "Trusts") have filed a counterclaim against the United States, and cross claims against the other defendants, to quiet title to the seven parcels of real property at issue. The Trust defendants move for summary judgment on their counterclaim. Defendant Etta Novotny is the wife of Edward Novotny and is named as a defendant because she may have an interest in the property at issue. Etta Novotny has filed a counterclaim against the United States to quiet title to her interest, if any, in the subject properties. Defendant Colorado Department of Revenue has filed cross claims against the defendants seeking to foreclose upon its tax liens against the seven parcels of property to satisfy a judgment entered in Montezuma County District Court, Case No. 99-CV-202, in favor of the State of Colorado and against Edward Novotny for unpaid 1989 and 1990 Colorado income taxes, penalties and interest. The following material facts are undisputed, unless otherwise noted.

A. Federal Tax Liens

Since 1957, defendant Edward Novotny ("Novotny") has operated a sole proprietorship, d/b/a Four Corners Auto Parts & Salvage, consisting of towing and auto mechanic services, and buying and selling used and wrecked vehicles and new and used auto parts in Cortez, Colorado. (Deposition of Edward Novotny ("Novotny Deposition"), pp. 28-29, 42-50; Etta Novotny Declaration, at ¶¶1-2) In 1989, Novotny and his wife, Etta Novotny, decided that Novotny should scale back his business operation; they entered into an agreement with

Copperstate Metals, Inc. to sell 2,600 vehicles as scrap metal. (Declaration of Etta Novotny, ¶15)

Novotny did not file a federal income tax return or pay any federal income taxes in 1989, 1990 and 1991 and has not filed a tax return since 1980. (Novotny Deposition, pp. 201-202; Government's Exs. 11, 12, 13 and 15) Novotny does not believe he is required to pay federal income taxes. (Edward Novotny's Response to United States Interrogatories, Government's Ex. 17, at p. 5)

The IRS conducted an audit concerning Novotny's failure to pay federal taxes for the years 1989 through 1991 and sent Notices of Deficiency for those tax years to Novotny. (Edward Novotny Response to Requests for Admissions, Government's Ex. 19, ¶¶4, 6) The Government's Certificates of Assessments and Payments for Edward G. Novotny for the 1989, 1990 and 1991 tax years reflect that Novotny owes the Government $100,684 in unpaid federal income taxes, $31,890 in assessed statutory penalties, and interest for those tax years.[2] (Government's Exs. 11, 12 and 13) The tax assessments against Novotny for the 1989 and 1990 tax years were made on May 17, 1993. (Compl., ¶17; Government's Exs. 11 and 12) The tax assessment against Novotny for the 1991 tax year was made on November 14, 1994. (Compl., ¶17; Government's Ex. 13)

On June 23, 1993, acting under the authority of the Commissioner of Revenue, Internal Revenue Service ("IRS") agents recorded Notices of Federal Tax Liens in the Montezuma County, Colorado, Clerk and Recorder's Office, listing tax assessments made against Novotny for the 1989 and 1990 tax years, and naming several entities, including the defendants Sunrise Investments and Midwest Limited, as nominees, alter egos or transferees of Novotny with respect to the assessments

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[2] The IRS has determined that, as of December 18, 2000, Novotny owed a total amount of $347,436.62 in unpaid federal taxes and interest. (Declaration of Jane Trujillo, Revenue Officer, Government's Ex. 14)

against Novotny. (Compl., ¶¶21-22 and Exs. 1 and 2; admitted, Trusts' Answer, ¶¶21-22) On March 1, 1995, the IRS recorded a Notice of Federal Tax Lien in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1991 tax year, and naming several entities, including the Trusts, as nominees, alter egos or transferees of Novotny with respect to the assessments against Novotny. (Compl., ¶¶23-24 and Exs. 3 and 4; *admitted,* Trusts' Answer, ¶¶23-24)

B. Transfers of Real Property to the Trusts

The Novotnys purchased a package of domestic trusts from Wyoming promoter Lowell Anderson and created the Trusts on June 1, 1979. (Novotny Deposition, pp. 197- 200, 469; Declaration of Etta Novotny, ¶¶4-5) The Novotnys formed the Trusts for estate planning purposes to preserve assets for their children. (Novotny Deposition, pp. 197-200, 469; Deposition of Etta Novotny, p. 16; Declaration of Etta Novotny, ¶4) Each Trust was organized under the laws of Wyoming and contains the following provisions: the trustees have discretion to distribute any Trust income or proceeds; the trustees have discretion to pay all officers, agents and employees of the Trust; the Trust exists for twenty-five years unless the trustees unanimously change the date; when the Trust terminates, the Trust assets are liquidated and distributed to the existing certificate holders; the Trust property is held in fee simple by the trustees for the benefit of the certificate holders; and, the trustees, officers, agents or employees possess only such authority as awarded them in the Trust documents. (Contract and Declaration of Trust for Midwest Limited and for Sunrise Investments, attached to the defendant Trusts' Answer as Exhibits 2 and 3, at ¶¶4, 5, 17, 24, 27, 29)

At the time the Trusts were created, each Trust issued 100 Trust Certificate Units ("TCUs"). (Etta Novotny Declaration, ¶6) On June 1, 1979, the Novotnys transferred title to the seven parcels of real property to the defendant Trusts in exchange for

$10.00 consideration for each parcel and fifty TCUs each. (Etta Novotny Declaration, ¶¶6-7; Novotny Deposition, pp. 411-412) Parcels 1, 2, 4, 5, and 6 were conveyed to defendant Midwest Limited. (Compl. at ¶¶26, 28, 32, 34 and 36 and Exs. 6, 8, 12, 14, and 16; *admitted,* Trusts' Answer, ¶¶26, 28, 32, 34 and 36) Parcels 3 and 7 were conveyed to defendant Sunrise Investments. (Compl. at ¶¶30, 38 and Exs. 10, 12, and 18; *admitted,* Trusts' Answer, ¶¶30, 38) The deeds transferring the properties to the Trusts were recorded in the Montezuma County Clerk and Recorder's Office on August 3, 1979. (Compl., Exs. 6, 8, 10, 12, 14, 16 and 18)

Parcel 1, legally described in paragraph ten of the Complaint, consists of two vacant lots on the corner of Empire and Broadway in Cortez, Colorado. (Novotny Deposition, pp. 263-266). Title to Parcel 1 was conveyed to the Novotnys on February 3, 1977 for the stated consideration of $10. (Compl., ¶25 and Ex. 5; admitted, Trusts' Answer, ¶25) The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $17,000. *(Id.)*

Parcel 2, legally described in paragraph eleven of the Complaint, consists of two commercial buildings located at 483 and 485 N. Broadway in Cortez, Colorado. (Novotny Deposition, p. 274) Title to Parcel 2 was conveyed to the Novotnys on November 18, 1977 for the stated consideration of $10. (Compl. ¶27 and Ex. 7; *admitted*, Trusts' Answer, ¶27) The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $58,000. *(Id.)*

Parcel 3, legally described in paragraph twelve of the Complaint, consists of sixty-two acres of land located at 13106 U.S. Highway 666, Cortez, Colorado and contains the Novotnys' residence. (Novotny Deposition, p. 323) Title to Parcel 3 was conveyed to the Novotnys on September 15, 1956 for the stated consideration of $10. (Compl., ¶29 and Ex. 9; *admitted,* Trusts' Answer, ¶¶29)

Parcel 4, legally described in paragraph thirteen of the

Complaint, is located at 23400 Road N, Cortez, Colorado and consists of seventeen acres of land. (Novotny Deposition, p. 337) Title to Parcel 4 was conveyed to the Novotnys on August 7, 1978 for the stated consideration of $10.00. (Compl., ¶31 and Ex. 11; *admitted,* Trusts' Answer, ¶31) The documentary fee stamp indicates that the purchase price was $16,000. *(Id.)*

Parcel 5, legally described in paragraph fourteen of the complaint, is located at 112 North Street E., Cortez, Colorado and consists of a 900-square foot house. (Novotny Deposition, pp. 342-43). Title to Parcel 5 was conveyed to the Novotnys on March 2, 1978 for the stated consideration of $10. (Compl., ¶33 and Ex. 13; *admitted,* Trusts' Answer, ¶33) The documentary fee stamp applied indicated that the purchase price was $19,000. *(Id.)*

Parcel 6, legally described in paragraph fifteen of the Complaint, is located at 26058 Highway 145, Cortez, Colorado and consists of forty acres of vacant land. (Novotny Deposition, pp. 348-49). Title to Parcel 6 was conveyed to the Novotnys on August 25, 1975 for the stated consideration of $10. (Compl., ¶35 and Ex. 15; *admitted,* Trusts' Answer, ¶35) The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $56,000. *(Id.)*

Parcel 7, legally described in paragraph sixteen of the Complaint, is located at 29456 County Road U, Montezuma County, Colorado, and includes a small cabin. (Novotny Deposition, pp. 353-54). Title to Parcel 7 was conveyed to the Novotnys in a treasurer's deed on May 17, 1967. (Compl., ¶37 and Ex. 17; *admitted,* Trusts' Answer, (¶37)

The Novotnys served as trustees for Midwest Limited for a brief period in 1979 and then from October 1985 to the present. (Deposition of Etta Novotny as Representative of Midwest Limited, p. 8; Deposition of Edward Novotny as Representative for Midwest Limited, p. 5; Trusts' Answer, Exs 2 and 3) The Novotnys were trustees for Sunrise Investments for a brief period in 1979, and have served as the only trustees from

October 1985 to the present. (Ed Novotny Deposition, pp. 226, 370; Trusts' Answer, Exs. 2 and 3) The Novotnys, as trustees, make all decisions concerning the use of the seven parcels of property, with the exception of Parcel 5 which is managed by Trustee Costello. (Deposition of Etta Novotny as Representative of Midwest Limited, pp. 45-47, 51-52) Other trustees have been appointed throughout the years, but none have been involved in the management of the Trusts. (Trusts' Answer, Exs. 2, 3; Declaration of Etta Novotny, ¶5 Etta Novotny Deposition, pp. 55-57) The Novotnys have acted as trustees of the Trusts, even when their names have not appeared on the Trust documents as trustees. (Etta Novotny Deposition, pp. 56-57; Deposition of Barbara Costello, p. 31)

Novotny has been the "manager" of Midwest Limited since 1979 and maintains and repairs the Trust properties. (Novotny Deposition, p. 242) Novotny has never received compensation from Midwest Limited for performing the services. (Id. at 242-243) Barbara Costello, who has been a trustee of Midwest Limited since 1993, manages Parcel 5 without receiving compensation. (Costello Deposition, pp. 9-13)

Prior to June 1, 1979, Edward and Etta Novotny resided on Parcel 3 and used approximately fifty acres of the land for Novotny's auto parts and salvage business. (Novotny Deposition, pp. 27-30, 77; Etta Novotny Declaration, ¶1) The Novotnys continued to live at their residence on Parcel 3 after the property was transferred to Sunrise Investments, with the exception of a two to three year period when the property was leased to a Mr. Zack. (Novotny Deposition, pp. 11-17) The Novotnys have not paid rent to Sunrise Investments for the use of the property, or made improvements to the property, other than regular maintenance and repairs. (Id. at pp. 331-332) In June 1979, Sunrise Investments entered into an agreement to lease Parcel 3 to Midwest Limited for $10 per year, but Midwest Limited has not paid any rent to Sunrise Investments for that parcel. (Id. at pp. 329, 334, and attached lease agreement)

Novotny's auto salvage business has not paid rent to either Trust for the use of Parcel 3. (Novotny Deposition, pp. 127-130) Midwest Limited has never placed any limitations on the Novotnys' use of Parcel 3. (Etta Novotny Deposition, at pp. 46-48; Novotny Deposition, at pp. 335-337)

Parcel 2, consisting of two commercial buildings at 483 and 485 Broadway in Cortez, Colorado, is the main source of income for Midwest Limited. (Novotny Deposition, pp. 271-276) The buildings have been rented out over the years to various commercial enterprises. (*Id.* at pp. 275-76) The tenants are responsible for paying utilities in conjunction with their use of the buildings. (*Id.* at p. 284) Novotny managed the buildings on Parcel 2 before and after the property was transferred to Midwest Limited. (*Id.* at pp. 297-299) The monies generated from the building rentals are used to pay the property taxes and bills for the seven parcels of property. (Id. at pp. 340, 348, 352) Midwest Limited has never placed any limitations on the Novotnys' management of Parcel 2. (Etta Novotny Deposition, at pp. 46-48)

The Novotnys maintained Parcel 5 before Barbara Costello began managing the property in 1993. (Novotny deposition, p. 347) There is no evidence as to what use, if any, was made of Parcel 5 prior to 1993. Midwest Limited never placed any limitations on the Novotnys' management of Parcel 5. (Etta Novotny Deposition, at pp. 46-48) Costello uses Parcel 5 commercially as a place to train road crew flaggers. (Costello Deposition, p. 12) Costello does not pay rent to Midwest Limited for her use of Parcel 5, but has invested $6,000 to $7,000 of her own money to improve the building on the property. (*Id.* at pp. 13-14)

Novotny leases Parcel 6 to a cattleman for cattle grazing purposes. (Novotny deposition, pp. 349-350) The monies generated by Parcel 6 are used to pay the bills and taxes on the seven parcels of property. (*Id.* at p.352) Midwest Limited has not placed any limits on the Novotnys' use of Parcel 6. (*Id.* at

pp. 352-353)

Parcels 1 and 4 are undeveloped land. (Novotny Deposition, pp. 266-270, 337- 339) Parcel 7 has a cabin on it and the Novotnys have picked plums from the trees on the property. (*Id.* at pp. 353-59) There is no evidence that the Novotnys have ever made any use of Parcels 1 and 4.

When Midwest Limited had a bank account, Novotny was one of three signatories on that account and authorized payment of Midwest Limited's bills. (Novotny Deposition, p. 434; Etta Novotny Declaration, ¶11) Kathy Novotny, the Novotnys' daughter, also had signatory authority on Midwest Limited's bank account. (Etta Novotny Declaration, ¶11) In recent years, Novotny stores the monies received from the rental of Parcels 2 and 6 in a box to pay the Trusts' property taxes and bills. (Novotny Deposition, pp. 111-112, and 333-334) The Trusts have not filed income tax returns, maintained financial statements, or made any distributions of principal or income to the designated beneficiaries. (Id. at 196-197; Sunrise Investment's Response to Requests for Admission, Government's Ex. 9, ¶2 Midwest Limited's Response to Requests for Admission, Government's Ex. 7, ¶2) Sunrise Investments has no income. (Novotny Deposition, p. 360; Deposition of Etta Novotny, p. 22) When Midwest Limited has not had enough money to pay its bills and property taxes, the Novotnys have advanced the funds to the Trust to pay them. (Deposition of Novotny as Representative of Midwest Limited, p. 61; Novotny Deposition, pp. 340, 388-89) The Novotnys did not charge interest to Midwest Limited when they advanced funds to the Trust. (Deposition of Novotny as Representative of Midwest Limited, pp. 110-11) All of the monies which the Novotnys have advanced to the Trusts have been repaid by the Trusts, with the exception of an outstanding $17,500 loan to Midwest Limited. (Deposition of Novotny as Representative of Midwest Limited, p. 109) The rental income generated from Parcels 2 and 6 has never been appropriated by the Novotnys

for personal use. (Deposition of Novotny as Representative of Midwest Limited, pp. 110-111; Deposition of Etta Novotny as Representative of Midwest Limited, p. 53)

On August 5, 1983, the Novotnys transferred their Trust TCUs to Thelma Novotny, Novotny's mother. (Etta Novotny Declaration, ¶10; Trusts' Answer, Exs. 2 and 3) Thelma Novotny thereafter transferred the TCUs to the Novotnys' adult children in equal amounts on January 11, 1997. (Etta Novotny Declaration, ¶12; Trusts' Answer, Exs. 2 and 3) Thelma Novotny did not use the seven parcels of property after her name was placed on the TCUs. (Novotny Deposition, at pp. 368-369) Thelma Novotny did not receive any distributions of principal or income from the defendant Trusts. (*Id.* at pp. 196, 369) The Novotnys' four adult children - Frank, Doug, Julie and Kathy - have been listed as the holders of the TCUs for Midwest Limited and Sunrise Investments since 1997. (Novotny Deposition, 405-431) The Novotnys' children have not been involved in the management or financial affairs of the Trusts. (*Id.* at pp. 420-21; Deposition of Frank Novotny, p. 16; Deposition of Douglas Novotny, pp. 8, 10; Deposition of Julie Fertsch, pp. 30, 51; Deposition of Kathy Lawrence, p. 32) None of the children have received any distributions from the Trusts and do not have any expectations that they will receive distributions. (Frank Novotny Deposition, pp. 10, 16; Douglas Novotny Deposition, pp. 8, 11; Fertsch Deposition, pp. 28-29; Lawrence Deposition, p. 32) Frank and Douglas Novotny are not aware that the Trusts own any property. (Frank Novotny Deposition, p. 9; Douglas Novotny Deposition, pp. 8, 10) Prior to their depositions for this case, Douglas Novotny, Julie Fertsch and Frank Novotny had not seen the trust certificates containing their names. (Douglas Novotny Deposition, pp. 9, 12; Frank Novotny Deposition, pp. 11-12, 15; Fertsch Deposition, pp. 26-27)

The United States had not assessed tax deficiencies against Novotny at the time the parcels of real property were transferred to the Trusts in 1979, nor had the State of Colorado assessed

any tax deficiencies against Novotny at that time. (Etta Novotny Declaration, ¶9) Novotny was not rendered insolvent as a result of the property transfers. *(Id.)*

II.

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate under Fed.R.Civ.P. 56(c) when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The movant bears the initial burden to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). If this burden is met, the nonmovant must "come forward with specific facts showing that there is a genuine issue for trial as to elements essential to [the nonmovant's claim]." *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993)(internal citations omitted). The nonmovant has the burden to show that there are genuine issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court views the evidence of record and draws all reasonable inferences in the light most favorable to the nonmovant. *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995). To defeat a properly supported motion for summary judgment, "there must be evidence upon which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Conclusory allegations will not create a genuine issue of material fact necessitating trial. *White*, 45 F.3d at 363.

III.

A. Claim to Reduce Tax Deficiency to Judgment

The Government argues that it is entitled to summary judgment on its first claim for relief against Novotny, to reduce to judgment unpaid federal income taxes for the 1989, 1990 and 1991 tax years in the total amount of $100,684, statutory penalties assessed against Novotny for those tax years in the total amount of $31,890, and interest as allowed by law, because the certified Certificates of Assessments and Payments satisfy the Government's burden to establish the amount of federal taxes owed.

The Government has sued Novotny to collect taxes resulting from unreported income. A presumption of correctness attaches to the Commissioner of Revenue's assessment if there is some evidence in the record to show that the taxpayer received unreported income. *United States v. McMullin*, 948 F.2d 1188, 1192 (10th Cir. 1991). The record shows that the IRS used the bank deposits method to calculate Novotny's income for the 1989 and 1990 tax years, and used the Consumer Price Index method to calculate Novotny's income for the 1991 tax year because Novotny chose not to file federal income tax returns for those years. (Government's Ex. 18, Attachments 1 and 2) Taxpayers are required to retain sufficient books and records from which their actual income can be determined. 26 U.S.C. §6001; Treas. Reg. 1.6001-1(a). If a taxpayer's records are incomplete or inaccurate, the IRS is authorized to reconstruct his income in accordance with any reasonable method that accurately reflects actual income. 26 U.S.C. §446; *Jones v. Comm'r of Revenue*, 903 F.2d 1301, 1303 (10thCir. 1990); *Palmer v. United States*, 116 F.3d 1309, 1312 (9'" Cir. 1997); *see, also, Dodge v. Comm'r of Revenue*, 981 F.2d 350, 353 (8th Cir. 1992) (holding that IRS acted reasonably in reconstructing taxpayer's income from bank deposits); *Moore v. Comm'r of Revenue*, 722 F.2d 193, 196 (5th Cir. 1984) (holding that IRS acted reasonably in projecting taxpayer's income based on increases reflected in the Consumer Price Index).

The Notices of Deficiency for the 1989 and 1990 tax years reflect that Novotny received unreported income for interest, dividends, bank deposits, and capitol gains. (Government's Ex. 18, Attachment 1) The Notice of Deficiency for 1989 also shows that Novotny received income from the sale of inventory in the amount of $201,400. *(Id.)* The Notice of Deficiency for the 1991 tax year shows that Novotny received income from interest, dividends, capitol gains and self-employment income. (*Id.*, Attachment 2) Novotny admits that he received substantially all of the monies identified as "income" in the Government's Notices of Deficiency for the 1989, 1990 and 1991 tax years, but denies that any of the monies received were from capital gains, interest payments, or the "sale" of inventory. (Novotny's Answer to United States' Requests for Admissions, Government's Ex. 19). Further, it is undisputed that Novotny sold all or most of his auto salvage business to Copperstate Metals in 1989.

I find that the United States has met its burden to produce some evidence to support the tax deficiency assessments against Novotny for the 1989, 1990 and 1991 tax years. Accordingly, a presumption of correctness attaches to the Government's certified Certificates of Assessments and Payments against Novotny for those tax years.[3]

Because the Government has demonstrated that it is entitled to the presumption that valid tax assessments were made, the

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[3] The certified Certificates of Assessments and Payments ("Form 4340") (Government's Exs. 11, 12 and 13) are presumptive proof that the assessments were made in the manner prescribed by 26 U.S.C. §6203 and Treas. Reg. 301.6203-1. *Long v. United States*, 972 F.2d 1174, 1181 (10th Cir. 1992). Additionally, the government's Form 4340 is presumptive proof that the government has satisfied the notice and demand requirements of 29 U.S.C. §6303. *See Geiselman v. United States*, 961 F.2d 1, 6 (st Cir. 1992)(holding that certified Form 4340 which listed "first notice" dates for each tax assessment constitutes presumptive proof that the IRS provided notice and made demand for payment to the taxpayer); *see, also, United States v. Chila*, 871 F.2d 1015, 1019 (11th Cir. 1989).

burden shifts to Novotny to overcome the presumption by presenting admissible evidence which refutes the fact or amount of the assessments. *Long*, 972 F.2d at 1181, n. 9; *United States v. Gosnell*, 961 F.2d 1518, 1519 (10th Cir. 1992) (quoting *Jones v. Comm'r of Revenue*, 903 F.2d 1301, 1303 (10th Cir. 1990)).

Novotny is proceeding pro se. He first argues, to no avail, that he is not subject to the federal income tax. The arguments which Novotny advances in support of his position have been soundly rejected by the courts. *See Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990); *Charczuk v. Comm'r of Revenue*, 771 F.2d 471, 472-474 (10th Cir. 1977) (citing *Ficalora v. Comm'r of Internal Revenue*, 751 F.2d 85 (2d Cir. 1984)).

Novotny next asserts that he is not liable for any income tax for the years 1989, 1990 and 1991 because his profit and loss statements show that he suffered a loss for each of those tax years. (See Exs. 47-49 to Novotny's Response to United States' Motion for Summary Judgment ("MSJ"); Ex. A to Declaration of Etta Novotny, attached to defendant Trusts' Opposition to United States' MSJ) Specifically, Novotny maintains that: (1) the Government did not allow him the correct amount in business expense deductions for the tax years 1989, 1990, and 1991; (2) the Government did not deduct his costs when it established his basis in the cars sold to Copperstate Metals when calculating Novotny's income for the 1989 tax year; and (3) the Government taxed him up to eight times on the same income.

Novotny bears the burden to demonstrate that he is entitled to the claimed business expense deductions. *See INDOPCO, Inc. v. Comm'r of Revenue*, 503 U.S. 79 (1992); *Hradesky v. Comm'r of Revenue*, 65 T.C. 87, 90 (1975), *aff'd per curiam*, 540 F.2d 821 (5th Cir. 1976); *Ashley v. Comm'r of Revenue*, 80 TCM 841 (2000). Similarly, Novotny must prove his cost basis in property; otherwise, the basis of property is deemed to be zero. *G.M. Leasing Corp. v. United States*, 514 F.2d 935, 941 (10thCir. 1975), *aff'd in part and rev'd in part on other grounds*,

429 U.S. 338 (1977)(citing *Factor v. Comm'r of Revenue*, 281 F.2d 100 (9th Cir. 1960)); *Irwin H. Bard*, 90 TCM 431, pp. 2088-90.

The United States argues that Novotny's profit and loss statements are inadmissible hearsay because the documents do not satisfy the business records exception under Fed.R. Evid. 803(6).[4]

Novotny must proffer admissible evidence to refute the presumption that the United States' tax assessments against him are valid. *Long*, 972 F.2d at 1181, n. 9; Fed.R.Civ.P. 56(e). Because the profit and loss statements submitted by Novotny are hearsay under Fed.R.Evid. 801, they are inadmissible unless an exception to the hearsay rule applies. Fed.R.Evid. 802. The record shows that Novotny's profit and loss statements for the tax years 1989, 1990 and 1991 were not maintained in the course of a regularly conducted business activity, but were instead prepared by Etta Novotny sometime after July 2000 in response to a specific request from Government counsel. (Declaration of Etta Novotny, ¶17) The business records exception set forth in Fed.R. Evid. 803(6) does not apply. The profit and loss statements will be excluded because Novotny has not demonstrated that they are admissible under any exception to the hearsay rule.

Even if the profit and loss statements are admissible, Novotny did not provide the Government with any corroborating records to substantiate his claims regarding his cost basis in the cars sold to Copperstate Metals in 1989. Novotny's uncorroborated and self- serving profit and loss statements are insufficient to overcome the presumption of correctness afforded the determinations of the Commissioner.

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[4]Fed.R. Evid. 803(6) provides an exception to the hearsay rule for records kept in the course of a regularly conducted business activity, made contemporaneous to the time of the events, as shown by the testimony of a qualified witness.

See Mays v. United States, 763 F.2d 1295, 1297 (8th Cir. 1985). Novotny contends that he sold 2,600 vehicles as scrap metal in 1989 which were purchased at an average price of $125 per vehicle (totaling $325,000 for the cost of goods sold); however, he has not produced any supporting records to verify that he sold 2,600 vehicles to Copperstate Metals, other than his own recollection (Novotny Deposition, p. 83), or any records to substantiate his calculated figure of $125 to purchase each vehicle. Novotny has also failed to proffer substantiating records to establish how the costs of goods were allocated, or whether such allocation was proper in order to refute the Government's determination that he received $201,400 from the sale of scrap metal. Novotny's profit and loss statements reflect that he deducted the entire cost of each vehicle from the price he received when the cars were sold to Copperstate Metals as scrap metal. The scrap metal sold to Copperstate was acquired from cars which had been accumulating in Novotny's salvage yard since 1957. (Novotny Deposition, p. 124) Parts from most of the cars had been sold by Four Corners over the years prior to the 1989 sale. (Novotny as Representative of Midwest Limited deposition, pp. 71-72, 86) Novotny may not deduct the entire cost of each vehicle from the amount he received from the sale of the cars to Copperstate Metals in 1989 without taking into account the fact that he sold parts from many of the vehicles over the years. I find that Novotny has failed to provide corroborating documentation to establish his claimed basis in the cars sold to Copperstate Metals in 1989; thus, Novotny has failed to raise a genuine issue of material fact about the correctness of the Government's certified Certificates of Assessments and Payments for 1989 which assign Novotny $201, 400 in income for the sale of inventory and a presumed zero basis in that inventory.

Novotny next argues that the Government did not allow him the correct amount in business expense deductions for the tax years 1989, 1990, and 1991. Novotny maintains that eighty-

six percent of the monies he received in those years should have been deducted as business expenses. (See Novotny's Answer to United States' Interrogatories, Government's Ex. 17, attachment, p. 186) Novotny did not provide the Government with any documentation to substantiate his assertion until on or about April 11, 2001. Novotny then produced to the United States bank statements, cancelled checks and ledger pages for the Four Corners Auto Parts & Salvage business for the tax years 1989, 1990 and 1991, in response to a court order granting the United States' Motion to Compel [filed February 22, 2001]. See "Respondent['s]... Response to Courts Order to Compel Certain Answers and Copies of Checks to Support Private Profit and Loss Statement." I find that the records produced by Novotny in April 2001 provide some evidence of Novotny's expenses for the tax years 1989 through 1991 sufficient to create a genuine issue of material fact on the issue of whether Novotny is entitled to additional business expense deductions for those tax years which would require a reduction in the taxable income attributed to Novotny in the Government's certified Certificates of Assessments for those tax years.

Finally, Novotny argues that he was taxed up to eight times on the same income, but he has not provided any documentation or expert testimony to support his assertions. Novotny's unsubstantiated claim is insufficient to create a genuine issue of material fact about the correctness of the Government's certified Certificates of Assessments and Payments for 1989, 1990 and 1991.

Novotny was also assessed statutory additions for the 1989, 1990 and 1991 tax years under 26 U.S.C. §6651(a)(1) for failure to file tax returns on time without reasonable cause, and under 26 U.S.C. §6654 for underpayment of estimated taxes. (Government's Ex. 18, Attachments 1 and 2) Novotny does not dispute that he did not pay his taxes in a timely manner or that he failed to make estimated tax payments for the years in question. Further, Novotny has not demonstrated reasonable

cause for his failure to file timely tax returns for the 1989, 1990 and 1991 tax years. Novotny is thus liable for statutory additions under 26 U.S.C. §6651(a)(1) and §6654. The penalty assessments reflected in the Government's certified Certificates of Assessments and Payments were determined from Novotny's calculated income tax liability and are based on a percentage of that tax liability. 26 U.S.C. §6651(a)(1) and §6654. Because I have determined that a genuine issue of material fact exists as to the correctness of the Government's income tax deficiency assessments against Novotny, based on possible business expense deductions to which Novotny may be entitled, I also find that a genuine issue of material fact exists as to the correctness of the assessed statutory penalties for the 1989, 1990 and 1991 tax years.

In sum, I find that Novotny has failed to meet his burden to demonstrate that genuine issues of material fact exist as to the correctness of the tax deficiency assessments reflected in the Government's certified Certificates of Assessments and payments for the 1989, 1990 and 1991 tax years, excepting the issue of whether Novotny is entitled to additional business expense deductions for those tax years. Because of the existence of that single issue of disputed material fact, I deny the United States' Motion for Summary Judgment on Claim One.

B. Can the United States foreclose its federal tax liens against the seven parcels of real property to satisfy Novotny's federal tax liabilities?

In Claim Two, the United States seeks to foreclose its federal tax liens against the seven parcels of real property to which the Trusts hold paper title on the ground that the Novotny's purported conveyances of the properties to the Trusts were ineffective to convey legal title to the Trusts under Colorado law. In Claims Three through Six, which are pleaded in the alternative to Claim Two, the United States seeks to foreclose its tax liens under the theories that the Trusts hold legal title to the properties as the nominees of Edward Novotny, that the

Trusts are the alter egos of Novotny, or that the Trusts are sham trusts, and, therefore, Novotny retains a beneficial interest in the Trust properties.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such person." 26 U.S.C. §6321. The federal tax lien arises automatically when (1) assessment has been made in accordance with 26 U.S.C. §6203; (2) the taxpayer has been given notice that states the amount of the assessment and demands payment under 26 U.S.C. §6303(a); and (3) the taxpayer has failed to pay the amount assessed. *See Egbert v. United States*, 752 F.Supp. 1010, 1015 (D.Wyo. 1990), *aff'd, United Stafes v. Egbert*, 940 F.2d 1539, 1991 WL 150859 (10th Cir. 1991); *Gufhrie v. Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992). The lien attaches at the time the assessments are made and continues until the liability is extinguished. 26 U.S.C. §6322; *United Sfates v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989)(internal citation omitted). Here, the tax liens against Novotny's property and rights to property arose when the IRS made tax deficiency assessments against Novotny for the 1989 and 1990 tax years in May 1993, and for the 1991 tax year in November 1994.

It is well settled that "state law controls in determining the nature of the legal interest which the taxpayer had in the property... sought to be reached by the [federal revenue act]." *Aquilino v. United States*, 363 U.S. 509, 513 (1960)(quoting *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940)); *see, also, United States v. Mitchell*, 403 U.S. 190, 197 (1971)(citations omitted); *Gardner v. United States*, 34 F.3d 985, 987 (10th Cir. 1994). "The statutory language 'all property and rights to property,' appearing in §6321 [and in §6331(a) and §6332(a)], is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20

(1985)(internal citation omitted). Federal law controls "the ultimate issue of whether a taxpayer has a beneficial interest in any property subject to [lien] for unpaid federal taxes." *Drye v. United States*, 528 U.S. 49, 57 (1999)(citing *Morgan*, 309 U.S. at 80)("State law creates legal interests and rights. The federal revenue acts designate what interest or rights, so created, shall be taxed.") Once the taxpayer's legal interest in the property is determined, the federal tax consequences that attach to that interest are a matter of federal law. *United States v. Bess*, 357 U.S. 51, 55 (1958); *United States v. Rodgers*, 461 U.S. 677, 683 (1982); *Gardner*, 34 F.3d at 987.

1. Are the United States' claims barred by collateral estoppel?

The Trusts argue that the United States is collaterally estopped from proceeding against the seven parcels of real property to satisfy the tax liabilities of Novotny by the Colorado Court of Appeals' decision in *Par Husan Ventures, et al. v. Thurl Boyd, et al. ("Par Husan")*, No. 97CA0948 (February 25, 1999) (not selected for publication) (attached as Ex. 1 to Trust Defs.' MSJ).

Colorado law determines the preclusive effect of a Colorado state court judgment. *United States v. Winchell*, 790 F.Supp. 245, 248 (D.Colo. 1992) (citing 28 U.S.C. §1738). In Colorado, collateral estoppel precludes relitigation of an issue that was actually litigated and necessarily adjudicated in a prior proceeding against a party to that proceeding, or someone who was in privity with a party, and the party against whom the doctrine is asserted had a full and fair opportunity to litigate. *Denver v. Consolidated Ditches Co.*, 807 P.2d 23, 32 (Colo. 1991).

In *Par Husan*, the plaintiff trusts and individual family members affiliated with the trusts sought to quiet title to two tracts of real property conveyed to the trusts by the family members upon the creation of the trusts, and which had been sold by IRS auction to the defendants to satisfy the tax

deficiencies of some of the family members. The state trial court ruled that the trusts were invalid under Wyoming law for lack of identifiable beneficiaries and that the conveyances of property to the trusts were consequently of no effect. (*Par Husan* decision, p. 2) The trial court thus concluded that the taxpayer's interests in the properties were effectively conveyed to the defendants in the tax sale. (*Id.* at pp. 2-3) The Colorado Court of Appeals reversed the trial court's ruling that the Trusts were invalid for lack of identifiable beneficiaries and held that the trust documents were sufficient to form valid trusts under Wyoming law. (*Id.* at pp. 5-11) The Court of Appeals then remanded the case to the trial court for further proceedings to determine ownership interests in the properties. (*Id.* at pp. 13-16)

The Trust defendants argue that because the trust documents which formed Midwest Limited and Sunrise Investments are virtually identical to the trust documents which the Court of Appeals upheld as valid in Par Husan, the United States is collaterally estopped from challenging the Trusts' ownership interests in the seven parcels of real property at issue.

I find that the Trusts' attempt to invoke the doctrine of collateral estoppel against the United States fails. First, the issues litigated and decided in Par Husan are not the same issues involved in the instant action. The Court of Appeals did not address or decide the issue of whether the trusts were the nominees or alter egos of the taxpayer, or were sham trusts. Even if the Colorado Court of Appeals had decided those questions as they pertained to the trusts involved in that case, the issues of whether Midwest Limited and Sunrise Investments are sham trusts, are the alter egos of Edward Novotny, or hold title to the seven parcels of real property as the nominees Novotny, were not litigated and decided in the Par Husan case, nor could they have been. Similarly, the issue of whether Sunrise Investments and Midwest Limited complied with Colorado statutory requirements for acquiring legal title to real property

was not litigated or decided in *Par Husan.*

Second, the United States was not a party to the *Par Husan* case and there is no evidence that the United States was in privity with the *Par Husan* defendants. "Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is 'virtually represented' in the litigation." *Public Service Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 787 (Colo.App. 1991). The identity of interests must be demonstrated by a "functional or working relationship" in which the non-party's interests are presented and protected by the party in litigation. Id. The Trusts argue that the *Par Husan* defendants represented the United States' interests in that case because the defendants purchased the trust property at an IRS tax sale. This argument ignores the fact that the United States had sold its interest in the property when the *Par Husan* litigation commenced; thus, the United States did not have any interests to "represent" in that action. (Government Ex. 10, Affidavit of Robert A. Varra, ¶¶3, 13) Even if the United States had any interests in the subject property, those interests were not presented or protected by the *Par Husan* defendants. The undisputed evidence shows that the IRS did not provide trial strategies or otherwise actively participate in the defense of *Par Husan.* (Varra Affidavit, ¶¶3-12) The only participation by the IRS in the *Par Husan* suit was the subpoenaed lay witness testimony of IRS employees about the seizure and sale actions taken by the IRS against the taxpayers. (*Id.* at ¶¶5-12)

I find that collateral estoppel does not preclude the United States from seeking to foreclose its tax liens against the seven parcels of real property titled to the Trusts.

2. Were the conveyances of property to the Trusts in 1979 ineffective to convey legal title under Colorado law?

The Government asserts, in Claim Two, that it is entitled to foreclose its tax liens against the seven parcels of property because the Novotnys' purported conveyances of those properties to the Trusts in 1979 were ineffective to convey legal

title to the Trusts under COLO.REV.STAT. ("C.R.S.") §38-30-166.

Colorado law applies to issues relating to the conveyance and ownership of real property located within Colorado. See Restatement (Second) of Conflicts of Laws §223 and comment g (1971).

C.R.S. §38-30-166(1) states that a trust may acquire real property in the name of the trust upon compliance with subsection (2) which provides for the trustee to record an affidavit setting forth the name of the trust and the names and addresses of all the trustees with the county clerk and recorder of the county in which the property interest is located.

Parcels 3 and 7 were conveyed to Sunrise Investments on June 1, 1979. It is undisputed that none of the trustees of Sunrise Investments recorded an affidavit setting forth the name of the trust and the names and addresses of all the trustees on or before June 1, 1979, or at any time thereafter. (Compl., ¶39, *admitted*, Defendant Trusts' Answer, ¶¶39-40) The United States argues that because the trustees of Sunrise Investments did not record the requisite affidavit, the conveyances to that Trust are null and void and the property is still owned by the Novotnys.

The Government contends that the conveyances of real property to Midwest Limited were also legally ineffective because Midwest Limited did not file an affidavit in compliance with C.R.S.¶38-30-166(1) and (2) until five years after the purported transfers and that affidavit is defective because it does not list the names of all trustees. (*See* Trusts' Answer, Ex. 12) The Government further argues that Midwest Limited has failed to comply with the statutory requirement that a new affidavit be filed each time the identity of the trustees changes. C.R.S. ¶38-30-166(6).[5]

[5]C.R.S. §38-30-166(6) provides that in order for a trust to have acquired property before July 1, 1993, it must have complied with the statute as it existed prior to May 14, 1992. Before 1992, the statute required the trustees to record a new affidavit each time the identity of the trustees changed. See C.R.S. §38-30-166 Historical and Statutory Notes.

The record shows that on January 29, 1985, the trustees of Midwest Limited recorded an affidavit with the Montezuma County Clerk and Recorder which listed Lowell Anderson and Pioneer Trust as trustees. (Trusts' Answer, Ex. 12) When the affidavit recorded, Pioneer Trust was no longer a trustee of Midwest Limited, having resigned as trustee on June 7, 1984. (*Id.*, Ex. 2, Minutes of Midwest Limited dated June 7, 1984) A new trustee, Common Estates Company, was appointed on June 5, 1984. (*Id.*, Minutes of Midwest Limited dated June 5, 1984) Common Estates Company was not listed in the January 29, 1985 affidavit as a trustee. The Novotnys were appointed as trustees of Midwest Limited in October 1985 after Lowell Anderson and Common Estates Company resigned as trustees. (*see generally,* Defendant Trusts' Answer, Ex. 2) Midwest Limited did not file a new affidavit in October 1985 to reflect the appointment of the Novotnys as trustees.

The Trusts, relying on the Colorado Court of Appeals' unpublished decision in *Par Husan*, argue that C.R.S. §38-30-166 is a notice statute and that conveyances of property to a trust are not void for failure to comply strictly with the statutory terms. The Trusts emphasize that the affidavit filed by Midwest Limited on January 29, 1985 substantially complies with the staturoy requirements because the affidavit was signed and notarized on May 18, 1984, before Pioneer Trust resigned as trustee.

In *Par Husan*, the Colorado Court of Appeals held that C.R.S. §38-30-166 is a notice statute and a failure to comply with its affidavit requirement which is subsequently corrected does not invalidate a prior conveyance to a trust. *Par Husan*, at p. 21. The Colorado Court of Appeals found that although the trustee had not filed the requisite affidavits prior to, or contemporaneous with, the conveyances of real property to the trusts, the proper affidavits were filed well before the tax sale where the defendants purchased the porperty, so that defendants had adequate record notice that the porperty was owned by the

trusts. (Id.)

The court has located only one published decision by a Colorado appellate court addressing the requirements of C.R.S. §38-30-166. In *Oken v. Hammer*, 791 P.2d 9, 13 (Colo.App. 1990), the Colorado Court of Appeals explained that the statute "provides for the ownership of property by a trust," and "provides a method of giving notice to parties that the property is part of a trust estate and establishes, as a public record, those individuals empowered to deal with the trust property." In *Oken*, the court held that the trustee's recording of the Certificate of Trust Existence and Authority, signed under oath by the trustee, which granted the trustee all powers which may be exercised by individuals owning property in their own right, satisfied the filing requirements of C.R.S. §38-30-166(2) and established the trustee's authority to convey and encumber the subject property. *Id.* at p. 12.

United States v. Winchell, 790 F.Supp. 245, 247 (D.Colo. 1992) (Babcock, J.) involved a dispute over property which Winchell had conveyed to a trust organization in 1979. One of the parties to the dispute attacked the conveyance to the trust under C.R.S. C.R.S.§38-30-166. The court held that the statute must be strictly construed because it is in derogation of common law. See *Pigford v. People,* 593 P.2d 354 (Colo. 1979). The court found that the trust in question had filed a facially defective affidavit because the affidavit was signed by a person who was not named as a trustee in the affidavit. 790 F.Supp. at 247. The court then held as a matter of law that the trust failed to acquire the real property conveyed to it in 1979 and voided the conveyances. *Id.* at 248. The court cited the Colorado Court of Appeals' statement in *Oken v. Hammer*, at p. 12, that a statute which is clear must be applied as written. *Winchell,* 790 F.Supp. at 248.

The Colorado Supreme Court has not addressed the issue of whether a facially defective affidavit can satisfy the requirements of C.R.S. §38-30-166(2). In the absence of a

statutory interpretation by the state's highest court, interpretational decisions of state intermediate appellate courts provide evidence of how the state's highest court would rule on the issue. *See Stauth v. National Union Fire Ins. Co. of Pittsburgh,* 236 F.3d 1260, 1267 (10th Cir. 2001).

The *Oken v. Hammer* and *Par Husan* decisions did not specifically address whether a facially defective affidavit is sufficient to comply with C.R.S. §38-30-166(2). *Par Husan* decided only that the filing of a late affidavit satisfied the notice requirements of the statute and thus did not operate to void a conveyance of property to the trusts several years earlier. There is no indication in the *Par Husan* decision that the late affidavit was facially defective. The only case to address the specific issue of a facially defective affidavit is the *Winchell* decision. Because the Colorado appellate courts have not addressed the specific issue before me, I will follow *Winchell.*

I construe the filing requirements of C.R.S. §38-30-166 strictly and find that both Trusts have failed to comply with the statute. There is no evidence that Sunrise Investments has ever attempted to comply with the requirements of C.R.S. §38-30-166. With regard to Midwest Limited, the evidence shows that the trust did record an affidavit approximately six years after title to Parcels 1, 2, 4, 5, and 6 were conveyed to it by the Novotnys, but the affidavit failed to name the correct trustees. Because there had been a change of trustee prior to the date Midwest Limited recorded its affidavit, the trust should have amended the affidavit to reflect the name of the new trustee, Common Estates Company, who was appointed after Pioneer Trust Company resigned. Further, Midwest Limited should have amended the affidavit again in October 1988 to reflect the appointment of the Novotnys as trustees. I find and conclude as a matter of law that the defendant Trusts do not hold legal title to the seven parcels of real property because they have failed to comply with Colorado's statutory requirements for trusts to hold legal title to real property.

Because title to Parcels 1, 2, 3, 4, 5, 6 and 7 was not legally conveyed to Sunrise Investments and Midwest Limited in 1979, the Novotnys remained the fee simple owners of those properties, unless the Trusts successfully establish, in their quiet title counterclaims, that notwithstanding their failure to acquire legal title in 1979, the Trusts subsequently became the owners of the properties pursuant to Colorado statutes which allow persons to establish ownership by possession. *See* Discussion, Section III.B.3, *infra.* In Section III.B.3, *infra,* I find that genuine issues of material fact exist on the Trusts' counterclaims to quiet title to the seven parcels in the Trusts; thus, the question of whether the Novotnys or one of the Trusts owned the subject properties when the Government's tax liens arose in 1993 and 1994 cannot be resolved on summary judgment. I must therefore deny the United States' motion for Summary Judgment on Claim Two.

3. The Trusts' Counterclaims to Quiet Title

The Trusts contend that they are entitled to summary judgment on their counterclaims to quiet title to the seven parcels of property. The Trusts seek to establish their ownership of the property under C.R.S. §38-41–108 or §38-41-111(1).

C.R.S. §38-41-108 provides that a party who is in actual possession of property for seven years under color of title and who pays the legally assessed taxes shall be deemed the legal owner of the real property to the extent of his title. Section 38-41-111(1) states:

> No action shall be commenced or maintained against a person in possession of real property to question or attack the validity of or to set aside upon any ground or for any reason whatsoever any instrument of conveyance [or] deed... if such document has been recorded and has remained of record in the office of the county clerk and recorder of the county where said real property is situated for a period of seven years. All defects... or other grounds of invalidity... must be raised in a suit commenced within

said seven year period.

Sections 38-41-108 and 38-41-111(1) can be asserted as a means to establish title to or the right of possession of real property. C.R.S. §38-41-113; *see Childers v. Quartz Creek Land Co.*, 946 P.2d 534 (Colo.App. 1997), *cert dismissed,* 964 P.2d 509 (Colo. 1998). An action to enforce or establish a right to real property must be commenced within eighteen years after the right to bring such action accrued. C.R.S.§38-40-101(1). The Trusts' claims are timely under C.R.S. §38-40-101(1) because the earliest their claims accrued was in June or August 1986, seven years after the Novotnys attempted to transfer title to the properties to the Trusts and the deeds were recorded.

To establish ownership of the seven parcels under §38-41-108, the Trusts must prove that at the time the IRS tax liens arose, the Trusts had been in actual and exclusive possession of the properties for a period of seven continuous years and paid the taxes on the properties during that time period. *See Peters v. Smuggler-Durant Mining Co.*, 930 P.2d 575, 579-580 (Colo. 1997); *Ginsberg v. Stanley Aviation Corp.*, 568 P.2d 35 (1977). To establish ownership of the properties under C.R.S. §38-41-111(1), the Trusts must prove actual possession and that the deeds conveying the properties were properly recorded for a seven-year period. *See Ginsberg,* 568 P.2d at 38; *Calvat v. Juhan,* 206 P.2d 600 (1949). "Actual possession" means "physical occupancy or control over property." BLACK'S LAW DICTIONARY (7th ed. 1999).

I find that the evidence does not establish, as a matter of law, that the Trusts physically occupied or controlled Parcels 1, 2, 3, 4, 5, 6 and 7. The pertinent evidence of record shows the following: Novotny has controlled the management of all properties both during his tenures as trustee, and during the period from 1979 through 1985 when he was not an appointed trustee. Novotny has managed Parcels 2 and 6 for the benefit of the Trusts. The evidence regarding Novotny's personal use of Parcels 1, 4, 5 and 7 was meager and inconclusive. There is no

evidence that any use has been made of Parcels 1, 4 or 7. Parcel 5 has been managed by trustee Costello since 1993 and has been used for her personal business ventures, but there is no evidence about the use of Parcel 5 prior to 1993 when it was managed by Novotny.

With regard to Parcel 3, the evidence shows that after Parcel 3 was transferred to Sunrise Investments, Novotny continued to exercise control over the property which he uses solely for his and his wife's benefit, as their residence and for his auto salvage business. Novotny has never paid rent to either Trust for his use of Parcel 3 as a residence and for his business. The Novotnys have not made any significant improvements to Parcel 3 in lieu of rent. Further, the Trusts have not placed any restrictions on the Novotnys' use of Parcel 3 and no other persons have exercised control over Parcel 3 since the property was conveyed to the Trusts. It is unclear from the record whether the Novotnys or the Trusts paid the property taxes on Parcel 3 and the utility bills for the Novotnys' residence and business.

Genuine issues of material fact exist about whether the Trusts' have satisfied the "possession" element of C.R.S. §38-41-108 or §38-41-111(1) with respect to each parcel of real property. Issues of material issue of fact also exist as to whether the Trusts have paid the property taxes on Parcels 1, 2, 4, 5, 6 and 7 for the period required by C.R.S. §38-41-108. I therefore deny the Trusts' motion for summary judgment on their counterclaims to quiet title to Parcels 1, 2, 3, 4, 5, 6 and 7.[6]

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[6] The Trusts also assert, as an affirmative defense, that the United States' Claims Two through Six, to foreclose its tax liens which allegedly attached to the seven parcels of real property, are time- barred under the statutes of limitation provided for in C.R.S. §38-8-110, §38-41-108, and §38-41-111(1).

The federal government argues that it is not subject to state statutes of limitations in enforcing sovereign rights absent clear Congressional intent to the contrary. *United States v. Summerlin*, 310 U.S. 414, 417 (1940) ("When the United States becomes entitled to a claim, acting it its governmental capacity and asserts its claim in that right, it cannot be deemed to have

4. The United States' Motion for Summary Judgment on Claims Three through Six to foreclose its federal tax liens

The United States also moves for summary judgment on Claims Three through Six, to foreclose its tax liens on the seven parcels of property because Novotny retains a beneficial interest in the properties under the theories of nominee, alter ego or sham trust. I do not address the Government's arguments in support of their motion for summary judgment on Claims Three through Six because my ruling on Claim Two, that the Novotnys failed to convey legal title to the Trusts in 1979, obviates the need for a ruling as to those claims. The theories of nominee, alter ego and sham trust are not applicable because the Novotnys' purported conveyances of the properties to the Trusts in 1979 did not convey legal title to the Trusts.

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continued. . . .

abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.") (internal citation omitted); *Marshall v. Intermountain Electric Co., Inc.*, 614 F.2d 260, 262-63 (10th Cir. 1980); *United States v. Christenson*, 751 F.Supp. 1532, 1536 (D.Utah 1990) (holding that the United States was not bound by the Utah statute of limitations for fraudulent conveyance actions in action to enforce federal tax lien), *appeal dismissed* 961 F.2d 221 (10th Cir. 1992).

The United States has brought this action to enforce its sovereign right to collect taxes. The only statutory time limitation applicable to the United States' foreclosure claims is the ten-year limitations period prescribed by 26 U.S.C. §6502(a)(1)(stating that judicial actions to collect assessed tax liabilities must be commenced within ten years after the assessment is made). C.R.S. §38-8-110, which establishes a limitations period on actions to set aside a fraudulent conveyance, is not even arguably applicable because the United States has not asserted a fraudulent conveyance claim.

C.R.S. §38-41-108 and §38-41-111(1) bar the United States' foreclosure claims against the subject properties only if the Trusts prove at trial that they were the owners of the properties at the time the Government's tax liens arose in 1993 and 1994 because they had established ownership of the properties in accordance with the statutory requirements. If the Trusts legally owned the properties at the time the tax liens arose, the IRS cannot reach the properties to satisfy Novotny's tax debts because Novotny did not have a beneficial interest in the properties under state law.

IV.

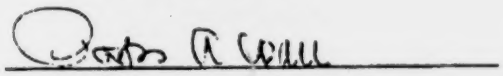
Accordingly, it is

ORDERED that the United States' Motion for Summary Judgment [originally filed on December 22, 2001] is **DENIED.** It is

FURTHER ORDERED that Defendants Midwest Limited and Sunrise Investments' Motion for Summary Judgment [filed September 28, 2000] is **DENIED**.

Dated this ~ day of September, 2001.

BY THE COURT:



PATRICIA A. COAN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

Civil Action No. 99-D-2196

The undersigned certifies that a copy of the foregoing Memorandum and Opinion Order was served and on September 14, 2001 by: (*) Delivery to; or by (**) Depositing in the United States Mail, postage prepaid, addressed to:

Edward G. Novotny **
Etta B. Novotny
13106 Highway 666 N
Cortez, CO 81321

Philip E. Blondin **
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Secretary/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
U.S. ED STATES DISTRICT COURT
DENVER, COLO
SEP 16 2002
JAMES R. MANSPEAKER
CLERK

Civil Action No. 99-RB-2196 (PAC)

UNITED STATES OF AMERICA,
Plaintiff
V.
EDWARD G. NOVOTNY, in his individual capacity and as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS; and ETTA B. NOVOTNY, in her individual capacity and as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS and THE STATE OF COLORADO, Department of Revenue,
Defendants;

ORDER OF FORECLOSURE AND DECREE OF SALE

Pursuant to 28 U.S.C. 552001 and 2002 and 26 U.S.C. 557402 and 7403, the Court enters this Order of Foreclosure and Decree of Sale. IT IS HEREBY ORDERED THAT:

1. The United States' federal tax liens against Edward G. Novotny, arising out of the Internal Revenue Service assessment of Form 1040 federal income tax liabilities against him for the 1989, 1990, and 1991 tax years, and the United States' judgment lien against Edward G. Novotny, arising out of the United States' claim to reduce these same assessments to judgment in the above-captioned civil action, are foreclosed.

2. The Internal Revenue Service is authorized and directed under 28 U.S.C. 552001 and 2002 to offer for public sale and sell the seven parcels of real property, including all improvements, buildings, and fixtures on the real property, described as follows (hereafter "the real property"):

Parcel 1:

Commonly known as 710 and 720 N. Broadway, Cortez, Colorado (corner of Empire and Broadway Streets).

Minimum bid: $46,800.00

Deposit: $4,000.00

Legal description:

A tract of land in the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section 23, Township 36 North, Range 16 West, N.M.P.M., described as follows: Beginning at a point on the section line common to Sections 23 and 26 where the East R/W line of U.S. Highway 160 intersects said section line and whence the section Corner 22, 23, 26 and 27 bears westerly a distance of 597.0 feet, more or less; thence Northwesterly along the East R/W line of Highway 160, which is a curve of radius 1492.5 feet, a distance of 557.0 feet; thence Southeasterly a distance of 802.0 feet to a point on the section line common to sections 23 and 26, which is 440.0 feet East from the point of beginning; thence West along the Section line a distance of 440.0 feet to the point of beginning. EXCEPTING therefrom that portion of said tract dedicated for Empire Street in the amended plat filed in Plat Book 8, Page 43 of Montezuma County records.

Said tract is sometimes known as Tract T of Montview Addition to the City of Cortez, Colorado.

Parcel 2:

Commonly known as 483 and 485 N. Broadway, Cortez, Colorado.

Minimum bid: $56,400.00

Deposit: $5,000.00

Legal description:

A portion of the SW1/2NW1/4NW1/4 of Section 26, Township 36 North, Range 16 West, N.M.P.M.,

described by metes and bounds as follows: Commencing at a point on the West line of the S1/4NW1/4NW1/4 75 feet South of the Northwest Corner of said S1/2NW1/4NW1/4, which is the point of beginning, thence East 150 feet, thence South 25 feet, thence East 205 feet, more or less to point of intersection of Westerly right of way line of U.S. Highway No. 666 (Formerly U.S. Highway No. 160) as now constructed. Thence Southwesterly along said westerly right of way to a point 175 feet due South of the North line of said S1/2NW1/4NW1/4, thence West 320 feet more or less to the West line of said S1/2NW1/4NW1/4 of Section 26, Township 36 North, Range 16 West, thence North along the West line of said S1/2NW1/4NW1/4, 100 feet to the point of beginning. EXCEPT a tract as follows: Commencing at a point on the West line of the S1/2NW1/4NW1/4 of said Section 26, Township 36 North, Range 16 West, N.M.P.M., 175 South of the Northwest Corner of said S1/2NW1/4NW1/4, Section 26, Township 36 North, Range 16 West, N.M.P.M., thence East to a point of intersection with the West right of way line of U.S. Highway No. 666 as now constructed which is the point of beginning, thence West along last described line for 120 feet, thence North 65 feet, thence East to a point of intersection with the Westerly right of way line of U.S. Highway No. 666 as now constructed, thence Southwesterly along the Westerly right of way line of U.S. Highway 666 to the point of beginning.

AND

A tract of land situated in the NE1/4NE1/4 of Section 27, Township 36 North, Range 16 West, N.M.P.M., described as follows: Beginning at a point on the Section line; whence the Northeast Corner of Section 27 Township 36 North, Range 16 West, N.M.P.M., bears North 00°08.5' West a distance of 719.6 feet; thence

South 89'52' West 35.0 feet to an iron R.B.Pin, M inch in diameter set in ground; thence South 00°08' East 115.0 feet to an iron R.B. Pin 1/2 inch in diameter set in ground; thence North 89°52' East 35.0 feet to an iron R. B. Pin M inch in diameter set in ground on the Section line; thence North 00°08' West 115.0 feet to the point of beginning.

EXCEPT all oil, gas and minerals reserved by prior grantors.

Parcel 3:

Commonly known as 13106 U.S. Highway No. 666, Cortez, Colorado.

Minimum bid: $168,000.00

Deposit: $10,000.00

Legal description:

South One-Half of Southwest Quarter (S1/2 SW1/4), less that portion lying west of the East line of Highway No. 160, Northeast Quarter of Southwest Quarter (NE1/4 SW1/4) and Northwest Quarter of Southeast Quarter (NW1/4SE1/4) of Section Four (4), Township Thirty-Six (36) North, Range Sixteen (16) West of the New Mexico Principal Meridian. Together with any and all water and ditch RIGHTS AND rights of way therefor used for and in connection with irrigation of said premises. Containing 142 acres, more or less.

Parcel 4:

Commonly described as 23400 Road N, Cortez, Colorado.

Minimum bid: $20,280.00

Deposit: $2,000.00

Legal description:

A tract of Land in the NE1/4NW1/4 of Section 9, Township 36 North, Range 16 West N.M.P.M., more particularly described as follows: Beginning at a point on the North line of said Section 9, said point also center

line of County Road, whence the Northwest Corner of Section 9 bears South 88°46' West 1,854.29 feet; thence South 1°14' East 752.70 feet, thence North 79° 18' West 84.40 feet; thence North 64°09' West 111.20 feet to the North right-of-way line of U.S. Highway 666 (formerly No. 160) as now constructed; thence South 36°19' East 510.44 feet along said right-of-way line; thence North 59°01' 45" East 756.86 feet to the East line of the NE1/4NW1/4 of said Section 9; thence North 00°01' West 727.06 feet along the East Line of the NE1/4NW1/4 said Section 9 to the center of the County Road; thence South 88°46' ~~West 7~~84.41 feet along said center line to the point of beginning.

Subject to a reservation by prior grantors of an easement 30 feet wide for road purposes described as: Beginning at a point on the North line of said Section 9, also being the center of a County Road, whence the Northwest Corner of above said Section 9 bears South 88°46' West 2,608.70 feet; thence South 00°01' East 744.41 feet; thence North 59°01'45" East 34.98 feet; thence North 00°01' West 727.06 feet along the East line of NE1/4NW1/4 of said Section 9 to the North Quarter Corner being the center of County Road; thence South 88'46' West 30.0 feet along the center line of County Road to the point of beginning; said easement being reserved in Book 447 at Page 355 of Montezuma County records.

Subject to easements and rights of way visible and of record, and specifically subject to conveyance of access rights to the Department of Highways, State of Colorado and Montezuma Water Company.

Subject to prior reservation of all oil, gas, and minerals.

Parcel 5:

Commonly known as 112 North Street East, Cortez, Colorado.

Minimum bid: $21,600.00

Deposit: $2,000.00

Legal description:

That part of Lots 15, 16, 17 and 18 in Block 18, Town of Cortez, Colorado, described as follows: Beginning at a Point on the South Line of Lot 18 a distance of 47 feet and 8 inches West of the Southeast Corner of said Lot 18, thence North 100 feet to a point of the North Line of Lot 15, thence West along said North line of Lot 15 a distance of 47 feet and 8 inches to a point; thence South 100 feet to a point on the South line of Lot 18; thence East along the South line of said Lot 18 a distance of 47 feet and 8 inches to the point of beginning; all as per the plat of record in the Office of the Clerk and Recorder of Montezuma County, State of Colorado.

Parcel 6:

Commonly known as 27090 State Highway 145, Cortez, Colorado.

Minimum bid: $48,000.00

Deposit: $4,000.00

Legal description:

A tract of land in the East Half (E1/2) of Tract Forty One (41), Township Thirty Eight (38) North, Range Twelve (12) West, N.M.P.M., being more particularly described as follows:

Beginning at a point on the South Right of Way line of Colorado Highway 145 and on the East line of Tract 41,

Township 38 North, Range 12 West, N.M.P.M., from which Point Angle Point 2 of Tract 40, Township 38 North, Range 12 West, N.M.P.M., bears North 0°01'00" West a distance of 108.45 feet; Thence South 0°01'00" East a distance of 1211.55 feet along the East line of said Tract 41 to the South line of said Tract 41; Thence South 89°59'00" West a distance of 1398.21 feet along the south line of said Tract 41 to the West line of the

East Half of said Tract 41; Thence North 0°04'08" West a distance of 1105.70 feet along the West line of the East Half of said Tract 41 to the South Right of Way line of Colorado Highway 145; Thence North 85°39'25" East a distance of 1403.22 feet along the South Right of Way line of Colorado Highway 145 to the point of beginning, and conveying also to grantee a One Fourth (1/4) interest in and to Dolores River Priority g 30; granting unto grantee the use of ditch and ditch rights appurtenant to said lands.
EXCEPTING AND RESERVING 100% of all oil, gas, and other minerals lying in, under and upon said lands.
EXCEPT Rights of Way and Easements visible and of record.

Parcel 7:
Commonly known as 29415 County Road U or 18052 County Road 28.

Minimum bid: $7,200.00
Deposit: $1,000.00
Legal description:
A tract of land in the NE1/4 NW1/4 of Section 16, Township 37 Range 15, recorded in Book 123 at page 34 in Montezuma County, State of Colorado.

This Order of Foreclosure and Decree of Sale shall act as a special writ of execution and no further orders or process from the Court shall be required.

3. The Internal Revenue Service is authorized to have free access to the real property and to take all actions necessary to preserve the real property, including, without limitation, retaining a locksmith or other person to change or install locks or other security devices on any part of the real property, until the deeds of the real property are delivered to the ultimate purchaser(s).

4. The terms and conditions of sale are as follows:

a. The sale shall be free and clear of the interests of Edward G. Novotny, Etta B. Novotny, Midwest Limited, and Sunrise Investments.

b. The sale shall be subject to the building lines, if established, all laws, ordinances, governmental regulations (including building and zoning ordinances), affecting the premises, and easements and restrictions of record, if any.

c. The public sale of the real property shall be held either at the courthouse of the county, parish or city in which the real property is located, or on the premises of any of the parcels of real property.

d. The date and time of the public sale are to be announced by the Internal Revenue Service.

e. Notice of the public sale shall be published once a week for at least four (4) consecutive weeks before the public sale in at least one newspaper regularly issued and of general circulation in the county, state or judicial district of the United States where the real property is situated and, at the discretion of the Internal Revenue Service, by any other notice the Internal Revenue Service deems appropriate. The notice shall contain a description of the real property and shall contain the basic terms and conditions of sale as set forth in this Order.

f. A minimum bid as set forth in paragraph 2 above is set for each parcel of real property. If the minimum bid is not met or exceeded with respect to any and/or all of the parcels of real property, the Internal Revenue Service may, without permission of this Court, and under the terms and conditions in this Order of Foreclosure and Decree of Sale, hold a new public sale of the unsold parcel(s) with a reduction of the minimum bid(s).

g. The successful bidder(s), with the exception of the United States in the event it is a successful bidder, shall be required to deposit at the time of sale with the Internal Revenue Service a deposit in the form of a certified check, cashier's check, or cash in the amount set forth in paragraph 2 above with respect

to each parcel of real property. Before being permitted to bid at sale, bidders, with the exception of the United States, shall display to the Internal Revenue Service proof that they are able to comply with this requirement. No bids on any parcel of real property will be received from any person who has not presented proof that, if they are the successful bidder(s), they can make the deposit(s) required by this Order with respect to the parcel(s) of real property.

h. The balance of the purchase price for the real property is to be paid to the Internal Revenue Service by certified check or cashier's check payable to the Internal Revenue Service within sixty (60) days after the date the bid is accepted. If a bidder fails to fulfill this requirement, that bidder's deposit shall be forfeited and shall be applied to cover the expenses of sale, with any remaining part retained by the United States to be applied to the unpaid tax liabilities comprising the judgment against Edward G. Novotny in the above-captioned civil action, and that parcel of real property shall be again offered for sale under the terms and conditions of this Order. The United States may bid as a credit against its judgment, without tender of cash.

i. The sale of real property shall be subject to confirmation by this Court. On the confirmation of the sale and receipt of payment in full, the Internal Revenue Service shall execute and deliver a quit claim deed conveying the real property to the purchaser(s). On confirmation of the sale, the real property shall be discharged and free from all interests in, liens against, or claims to the realty that are held or asserted by plaintiff or any of the defendants in this action.

5. All persons occupying the real property shall permanently leave and vacate the real property within 30 days of the date this Order of Foreclosure and Decree of Sale is filed, or within 30 days of the date a copy of it mailed to them, whichever is later, each taking with them their personal property (but leaving all improvements, buildings, fixtures, and appurtenances to the real property). If any person occupying the real property fails

or refuses to leave and vacate the real property by the time specified in this order, the U.S. Marshal and his deputies and/or the Internal Revenue Service are authorized and directed to take all actions that are reasonably necessary to bring about the ejectment of those persons without further process or authorization from this Court. If any person fails or refuses to remove his or her personal property from the real property by the time specified herein, the personal property remaining on the real property thereafter is deemed forfeited and abandoned, and the U.S. Marshal and his deputies and/or the Internal Revenue Service are authorized to remove it and dispose of it in any manner the U.S. Marshal and his deputies and/or the Internal Revenue Service sees fit, including sale, in which case the proceeds of the sale are to be first applied to the expenses of sale, then to the judgment in favor of the United States and against Edward G. Novotny in the above-captioned civil action, plus court ordered costs, and then to the judgment in favor of the Colorado Department of Revenue and against Edward G. Novotny in Montezuma County District Court Case No. 99-CV-202 for unpaid Colorado income taxes, penalties, and interest for 1989 and 1990, plus court ordered costs.

6. Until possession of the real property is obtained by the Internal Revenue Service, Edward G. Novotny and Etta B. Novotny shall take all reasonable steps necessary to preserve the real property (including all buildings, improvements, fixtures and appurtenances on the real property) in its current condition including without limitation, maintaining fire and casualty insurance policies on the real property. They shall not commit waste against the real property, nor shall they cause or permit anyone else to do so. They shall not do anything that tends to reduce the value or marketability of the real property, nor shall they cause or permit anyone else to do so.

7. The defendants shall not record any instruments or liens against the real property, publish any notice, or engage in any other action (such as running newspaper advertisements) that

may directly or indirectly tend to adversely affect the value of the real property or that may tend to discourage potential bidders from participating in the public auction.

8. When the sale is confirmed by the Court, the Montezuma County Recorder shall permit transfer(s) of the real property to be reflected on that county's register of title.

9. After the sale is confirmed by the Court, the Internal Revenue Service shall distribute the total amount paid by the purchaser(s) as follows:

a. First, the Internal Revenue Service shall retain an amount sufficient to cover the expenses of the sale, including but not limited to an amount sufficient to reimburse the United States for the payment of any delinquent county property taxes; the costs of advertising the public sale; and the expenses of any steps taken to secure or maintain the real property pending sale and confirmation by the Court.

b. Second, after payment of the expenses set forth in paragraph 9.a. above,

exactly one-half (50%) of the remaining funds shall be paid to Etta B. Novotny; and

exactly one-half (50%) of the remaining funds – the half not paid to Etta B. Novotny – shall first be paid to the United States of America to be applied to the unpaid federal income tax liabilities of Edward G. Novotny for the 1989, 1990, and 1991 tax years. The share paid to the United States to be applied to the federal income tax liabilities of Edward G. Novotny shall not exceed the amount necessary to satisfy the unpaid balance of the judgment entered against Edward G. Novotny and in favor of the United States in the above-captioned civil action, including the $380.00 of costs awarded to the United States on August 7, 2002, plus statutory additions.

c. Third, to the extent that any funds remain after the judgment in favor of the United States and against Edward G. Novotny in the above-captioned civil action has been satisfied, those remaining funds shall be paid to the Colorado Department

of Revenue, not to exceed the amount necessary to satisfy the unpaid balance of the judgment against Edward G. Novotny and in favor of the Colorado Department of Revenue in Montezuma County District Court Case No. 99-CV-202 for unpaid Colorado income taxes, penalties, and interest for 1989 and 1990 and the $307.85 of costs awarded to the Colorado Department of Revenue on August 7, 2002 in the above-captioned civil action.

d. Fourth, any funds remaining after the judgment in favor of the Colorado Department of Revenue has been satisfied shall be paid to Edward G. Novotny.

DATED this 13th day of September, 2002.

BY THE COURT

Bob Blackburn

ROBERT E. BLACKBURN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 99-RB-2196 (PAC)

The undersigned certifies that a copy of the foregoing Order was served on Sept 16, 2002, by:

(X) delivery to:

Magistrate Judge Partricia A. Coan

Robert D. Clark
Assistant Attorney General
D.C. Box 20

U.S. Attorney's Office

( ) by electronic mail to the addressed to:

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

Edward George Novotny
Etta B. Novotny
13106 HWY 666 N.
Cortez, CO 81321

Philip E. Blondin
U.S. Department of Justice, Tax
Division
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683

William A. Cohan
William A. Cohan, P.C.
8910 University Center Lane, #550
San Diego, CA 92122-1026

Deputy Clerk

Deputy Clerk